

Noferi, Mark (EOIR)

From: (b) (6)
Sent: Tuesday, May 30, 2017 7:45 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] SC on agg. fel., sexual abuse of minor; 8-0, Esquivel-Quintana v. Sessions

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From: Daniel Kowalski <dkowalski@allott.com>
Date: Tue, May 30, 2017 at 12:20 PM
Subject: [immprof] SC on agg. fel., sexual abuse of minor; 8-0, Esquivel-Quintana v. Sessions
To: immprof@lists.ucla.edu <immprof@lists.ucla.edu>

https://www.supremecourt.gov/opinions/16pdf/16-54_5i26.pdf

"Because the California statute at issue in this case does not categorically fall within that definition, a conviction pursuant to it is not an aggravated felony under §1101(a)(43)(A)."

Daniel M. Kowalski

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Mark Noferi

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Noferi, Mark (EOIR)

From: (b) (6)
Sent: Friday, June 9, 2017 12:16 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] IJ benchbook scrubbed from EOIR website

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From: Daniel Kowalski <dkowalski@allott.com>
Date: Thu, Jun 8, 2017 at 5:17 PM
Subject: [immprof] IJ benchbook scrubbed from EOIR website
To: immprof@lists.ucla.edu <immprof@lists.ucla.edu>

<https://www.justice.gov/eoir/immigration-judge-benchbook>

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Noferi, Mark (EOIR)

From: (b) (6)
Sent: Wednesday, June 14, 2017 8:09 AM
To: Noferi, Mark (EOIR)
Subject: McKeown and McLeod article
Attachments: McKeown and McLeod, Counsel Conundrum, in Refugee Roulette.pdf

(b) (6)

13 The Counsel Conundrum

Effective Representation in Immigration Proceedings

M. Margaret McKeown and Allegra McLeod

MARIA MORALES, a single mother of two native-born U.S.-citizen children, first came to the United States from Mexico as a young child. In 2000, Morales was charged with being "an alien present in the United States without admission or parole." Although Morales was represented by counsel at her hearing, her lawyer failed to introduce available documentary evidence and failed to elicit relevant testimony. Less than two weeks after Morales's hearing (at which she was denied relief), her lawyer was suspended from the practice of law. The California State Bar Court found that Morales's attorney handled more than 2,720 immigration cases during a two-year period in a manner that was "reckless and involved gross carelessness," and that while earning more than \$250,000 annually, he failed to competently represent clients, accepted more cases than he could handle, routinely "placed his interests above those of his clients" by permitting nonlawyers to perform legal work, and "consistently demonstrated a profound lack of understanding of his duty of fidelity to his clients."²

KEVIN SCOTT moved to the United States from Jamaica when he was eight years old. He attended grade school, high school, and college in New York, where his mother, father, and two sisters also live. At an immigration hearing to show cause why he should not be deported, the judge stated his belief that Scott was eligible for discretionary relief from deportation. The judge instructed Scott's counsel to file an appropriate application for relief within one month. Scott's lawyer assured the court that he did not need more time; nonetheless, Scott's attorney never filed an application. Shortly after, Scott was taken into INS custody and deported. Scott might well have received relief had it not been for his counsel's ineffective assistance.³

These unfortunate stories represent the classic "good news, bad news" scenario: the good news is that the petitioners had a lawyer; the bad news is that the petitioners had a lawyer. On a positive note, individuals facing the potentially dire consequences of deportation managed to retain counsel to help them navigate the complicated U.S. immigration legal system. Ultimately, though, their lawyers failed to perform to the most minimal standards of professional competence.

Of the many insights afforded by the Refugee Roulette study, among the most striking conclusions is that "whether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case."⁴ According to the study's authors, asylum seekers without legal counsel had a success rate of 16.3 percent, as compared to a 45.6 percent grant rate for those with representation.⁵ While attorneys appeared in only 35 percent of the 323,845 matters before immigration courts in 2006,⁶ asylum seekers represented by a lawyer were roughly three times more likely to be granted relief than applicants without legal counsel.⁷ But what these statistics obscure is that beyond the significance of the presence of legal counsel, the *quality* of representation in immigration litigation is of vital consequence. The authors of the Refugee Roulette study acknowledge that their analysis does not account for the relative effects of the quality of counsel on case outcomes.⁸

To begin to bridge this gap, this chapter examines federal appellate immigration case law addressing ineffective-assistance-of-counsel claims arising both in the asylum context and in other nonasylum immigration matters.⁹ In a court system that commences at the trial level before an immigration judge (IJ) and proceeds to an appeal before the Board of Immigration Appeals (BIA), the federal courts of appeal are, effectively, the courts of last resort. In 2006–2008, the United States Supreme Court heard only four immigration cases.¹⁰ In contrast, there were 9,123 immigration filings in the federal courts of appeal in 2007.¹¹ Federal appellate courts have a unique perspective on immigration proceedings: although only a select subset of cases is appealed (in virtually every case, the non-citizen party has lost at the administrative level and is challenging the result), the federal courts consider some of the most significant issues in immigration law.

Underrepresentation and poor quality of representation in immigration proceedings are but two of the trends noted frequently in federal appellate case law and showcased by the American Bar Association (ABA) at its 2008 program "The Immigration Crisis, the Courts, and the Rule of Law."¹² The crisis the program referenced is caused by a geometric rise in cases, the result of increased immigration enforcement and detention. By March 2002, the BIA struggled with a backlog of more than fifty-six thousand cases.¹³ In response, and in accord with procedural changes put in place in 2002 by then-Attorney General John Ashcroft, the BIA began to rely increasingly on summary dismissals and affirmances without

I. The Critical Role of Effective Counsel in Immigration Proceedings

The severe costs associated with deportation accentuate most evidently the importance of skilled counsel in immigration proceedings. In a 1948 opinion, the Supreme Court observed that "deportation is a drastic measure and at times the equivalent of banishment or exile."⁵⁵ At risk in immigration proceedings are aspects central to human life and dignity: the unity of family, the ability to work to support oneself and one's children, access to medical treatment and education, and sometimes the prospect of being returned to a country where one would face torture or persecution on account of race, religion, nationality, or political opinion. Indeed, "[t]he high stakes of a removal proceeding and the maze of immigration rules and regulations make evident the necessity of the right to counsel."⁵⁶

Judge Robert A. Katzmann of the Second Circuit has also eloquently noted the not uncommon defenselessness of individuals facing removal or deportation from the United States.⁵⁷ In *Aris v. Mukasey*, Judge Katzmann wrote that immigrants are often members of "a vulnerable population who come to this country searching for a better life, and who often arrive unfamiliar with our language and culture, in economic deprivation and in fear."⁵⁸ Such barriers only exacerbate the difficulty of comprehending the notoriously complicated tangle of U.S. immigration statutes, regulations, and cases.⁵⁹ As one judge put it, "[w]ith only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'"⁶⁰ Frequently, without skilled legal counsel, a person will be unable to "thread the labyrinth."⁶¹

Apart from the importance of high-quality lawyering for individuals and their families, the administrative system itself would benefit considerably from more widespread availability of competent representation. Judge Juan Osuna, chair of the BIA, summarized the effect of legal representation on the system as follows: "Effective and robust legal representation is absolutely critical to the immigration court system. Good lawyers help immigrants navigate a complex process, so that those with potential relief from removal get the assistance they need. And the system overall benefits when good lawyers get involved. Effective and professional representation makes everything work more smoothly."⁶²

At every stage of immigration proceedings, as in other areas of litigation and adjudication, the presence of competent counsel improves the efficiency of case processing and the administration of justice. At the outset, as a result of skilled advice, noncitizens may be diverted from the court system to other alternatives, such as nonjudicial relief, like family petitions, or they may decline to file for relief for which they are patently ineligible. Once the noncitizens are in the system, it is easier for immigration judges and administrative or judicial staff to deal with rep-

opinion,¹⁴ escalating considerably the number of petitions for review filed in the federal circuit courts of appeals.¹⁵ While between October 1999 and March 2002 there were 4,407 immigration appeals to circuit courts, between April 2002 and September 2006, 47,329 petitions for review were filed.¹⁶ These numbers provide evidence of the stresses borne by the system and the pressures under which lawyers, judges, and administrators labor. The deluge of immigration filings—what one of this essay's authors has pointedly described as a "legal tsunami"—threatens to overwhelm the system.¹⁷

The impact of the growth in immigration appeals has fallen disproportionately on the Second and Ninth Circuits.¹⁸ In the Ninth Circuit alone,¹⁹ since 2001, the number and proportion of immigration filings has grown dramatically, comprising almost 40 percent of the court's docket by 2006, up from 10 percent in 2001.²⁰ Although the proportion of immigration cases in the Ninth Circuit has begun to fall slightly, as of 2007 immigration matters remained more than 35 percent of the court's docket.²¹ In the Second Circuit,²² immigration cases constitute 39 percent of the court's docket, up from 4 percent in 2001.²³ Particularly in those federal circuits most affected by the rise in immigration cases, the resulting opinions all too often bear witness to the downstream consequences of inadequate representation.

Attending to this body of law, we suggest in this chapter that when the competency of counsel in immigration proceedings is taken into consideration, the differential outcomes associated with the presence of effective counsel are likely to be even more pronounced than identified by the authors of *Refugee Roulette*. Sadly, however, these cases also underscore that some individuals may be better served without counsel than by the assistance of an incompetent attorney or unqualified nonlawyer "immigration specialist." As a consequence, efforts to improve the fairness and consistency of immigration adjudication must focus on improving the quality of immigration counsel, not simply the availability of such counsel alone.

There are, of course, many highly competent, dedicated, and often underpaid immigration lawyers who diligently represent individuals and families. We wish to make clear at the outset that this chapter is not meant to be an indictment of the immigration bar, but instead is an effort to highlight and extend the crucial work that competent immigration attorneys perform. The expansion of the ranks of skilled immigration representation would have salutary effects for the immigration legal system in terms of efficiency, uniformity, and fairness, and would not undermine decisional independence, as might other reforms intended to address the inconsistencies revealed in *Refugee Roulette*.²⁴ Toward the ends of improved fairness and efficiency in immigration adjudication, this chapter examines the benefits enabled by high-quality representation and explores existing programs devoted to the recruitment, support, and training of immigration counsel.

representatives who understand the procedural intricacies and substantive complexities of the system. The presence of competent counsel cuts down on administrative continuances and unnecessary schedule disruptions. Effective counsel also makes possible a flowing presentation of the facts coupled with an explanation of the law that benefits both the client and the judicial system. For these reasons, effectively counseled cases are likely to move more quickly through the courts.

Just outcomes are more likely as well when effective counsel is present, because the facts necessary to a fair determination of the case will be developed, presented, and tested in light of the relevant law. In contrast, without an attorney or with an ineffective attorney, individuals testifying are frequently unaware of how to impart even the most fundamental information relating to the case to be decided. In one disturbing immigration trial, the Baltazars, husband and wife, who had lived in the United States since 1989 and who were parents of a U.S.-citizen child, sought suspension of deportation.³¹ The Baltazars were represented in the preliminary stages of their immigration proceedings by the same ineffective attorney at issue in Morales's case introduced in the epigraph to this chapter.³⁴ On the day of Mr. Baltazar's merits hearing, his attorney did not show up, so the IJ postponed the trial; ultimately, as it turned out, the Baltazars were forced to present their case without representation.³⁵ The main question before the court at the Baltazars' subsequent merits hearing involved what hardship would befall the couple and their U.S.-citizen child were the husband and wife to be deported. The IJ proceeded by simply asking the Baltazars whether it would cause them "hardship" to leave the United States.³⁶ In response, apparently not understanding, Mr. Baltazar responded, "No, that would be your decision." When asked again whether he had anything else he wished to contribute so that the IJ might be made aware of any grounds for a favorable hardship determination, Mr. Baltazar added, "No, I really believe it is your decision."³⁷ Unwittingly, the Baltazars abdicated their burden with respect to hardship, and the IJ denied the family relief. Without a lawyer to assist in the elaboration of the relevant equities, the Baltazars were effectively unable to articulate any ground upon which a hardship finding might be based, despite the facts that the couple had lived in the United States since they were teenagers, raised a U.S.-citizen child, and Mrs. Baltazar suffered from a disability. Competent counsel was necessary to a full consideration and proper determination of the Baltazars' case, and yet, as in numerous other immigration cases, effective counsel was absent, to the detriment of the administration of justice.

As retired California Supreme Court Justice Earl Johnson, Jr., explained,

If a quarter century on the appellate bench has taught me anything, it is that the judge suffers more than anyone other than the parties when litigants lack counsel. Whether presiding over a jury trial or struggling to personally decide a case, the trial judge faces a daunting, too often impossible task. Moreover, it is bad enough

when both sides are unrepresented; it is much worse when an unrepresented litigant faces the lawyer retained by a "well-counseled" adversary. . . . [O]dds are the decision will be based on a skewed version of the law and facts. The result? Far too often, an erroneous decision. . . . The trial judges in those cases would have had to have felt . . . uncomfortable about the distinct possibility that they were delivering injustice, rather than justice in those cases.³⁸

Another problem that arises routinely in uncounseled or poorly counseled cases involves the presentation to appeals courts of incomprehensible and incomplete transcripts of jumbled administrative trials.³⁹ Convolved transcripts make it difficult for appellate courts to determine what occurred at the trial level, and thus make difficult efficient and accurate appellate adjudication. The order and organization that is brought to an administrative hearing by well-prepared counsel considerably reduces problems related to convulsion in trial transcripts and poorly reasoned or unsubstantiated factual findings.

Additionally, advice from effective counsel would reduce frivolous appeals and the time some petitioners spend incarcerated pending resolution of their cases. The stops, starts, detours, and endless motions to reopen occasioned by ineffective counsel produce yet another costly pressure on the system. Where there is an appeal, competent counsel assists the administration of justice in terms of both efficiency and fairness by constructing a clearly organized and substantiated factual record and legal analysis for review.

II. The Right to Effective Assistance of Counsel under Current Law

Unlike in criminal proceedings, an individual in immigration proceedings has no right to appointed counsel.⁴⁰ Instead, there is a statutory entitlement to secure representation by counsel of one's choice, though "at no expense to the Government."⁴¹

In some instances, federal courts have recognized that in extraordinary circumstances there may be a potential due process right to appointed counsel in immigration proceedings. The Sixth Circuit was the first federal appellate court to recognize such a possible due process right: in 1975, *Jesus Aguilera-Enriquez* claimed that the denial of appointed counsel deprived him of his due process rights in his deportation proceeding. While holding that the absence of appointed counsel did not deprive Aguilera-Enriquez of "fundamental fairness," the Sixth Circuit determined that "[t]he test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide 'fundamental fairness'—the touchstone of due process."⁴² Despite *Aguilera-Enriquez* and later decisions from other circuits holding out, under exceptional conditions, the possibility of a right to counsel, as

a practical matter, appointment of counsel for an individual facing deportation has never been required under the fundamental fairness test.⁴³

Nonetheless, many courts have recognized that certain constitutional due process rights obtain in immigration court, including some related to counsel.⁴⁴ Only several months after the Sixth Circuit decided *Aguilera-Enriquez*, the Fifth Circuit acknowledged in *Paul v. INS* the potential existence of a right to effective assistance of counsel in immigration proceedings.⁴⁵ In the intervening years, multiple other circuits have acknowledged such a right where ineffective assistance is the cause of the forfeiture of relief.⁴⁶

In 1988, the BIA in *Matter of Lozada* articulated a set of criteria that must be satisfied to establish a claim of ineffective assistance of counsel in immigration court.⁴⁷ Federal appellate courts have mostly adopted the *Lozada* requirements,⁴⁸ and over the past decade and a half, courts have repeatedly reopened or remanded proceedings due to deficient performance of counsel.⁴⁹

In the final weeks of the Bush administration in early 2009, former attorney general Michael Mukasey issued a decision to supersede *Lozada*.⁵⁰ In *Matter of Compean*, Mukasey wrote that there is no due process right or other right to effective assistance of counsel in immigration proceedings. Instead, under the *Compean* framework, it is a matter of immigration judge or Board of Immigration Appeals discretion to reopen removal proceedings in "extraordinary cases" due to egregious lawyer error.⁵¹ As of mid-2009, Attorney General Holder withdrew the *Compean* decision and the issue is now slated for rulemaking. It is unclear whether ultimately the *Compean* or *Lozada* approach will control, but regardless of the governing legal framework, inadequate representation continues to impede the administration of justice in immigration proceedings.

III. The Consequences of Ineffective Immigration Lawyers

Ineffective assistance of counsel comes in many forms. Sometimes ineffectiveness is blatant and involves fraud and misrepresentation or failure to notify a client of proceedings. Oftentimes it is the result of irresponsibly missed deadlines; and on yet other occasions, only sheer ineptitude can explain the failure to cite the correct law, appear for a hearing, or respond to court orders.

The Department of Justice's Executive Office of Immigration Review (EOIR) has authority to impose sanctions on attorneys and accredited representatives who violate professional standards.⁵² As of late 2008, well over two hundred immigration attorneys had been suspended or expelled through the EOIR disciplinary process from practice before the immigration courts, often following their suspension from a state bar.⁵³

A brief review of the governing regulation brings to light the range of unethical conduct in question: repeated failure to appear for scheduled hearings, false statements, knowing false certification of a copy of a document, grossly excessive fees, improperly soliciting clients, and the list goes on.⁵⁴ Sadly, conduct of this ilk constitutes a "disturbing pattern of ineffectiveness" that occurs with "alarming frequency."⁵⁵

One widespread problem involves the failure of counsel to assemble relevant documentation to support in-court testimony. For example, in *Yang v. Gonzales*,⁵⁶ the II found Yang not credible based on discrepancies between Yang's hearing testimony and the documentation gathered (and not gathered) by Yang's counsel, who, like the California immigration attorney described in the epigraph to this chapter, was sanctioned for professional misconduct related to his immigration practice.⁵⁷ In the New York lawyer's disbarment proceeding, the Appellate Division of New York noted that the conduct of Yang's attorney reflected "a truly shocking disregard for his clients' and constituted a danger to any client who might retain him."⁵⁸

Immigration attorneys have even introduced affirmative falsehoods in some instances. In *Hamedí v. Gonzales*, Hamedí claimed his lawyer misrepresented multiple facts in documents presented to the court and then failed to meet with Hamedí so that he might discover these falsehoods.⁵⁹ The II based an adverse credibility finding in significant part on discrepancies between the documents filed by the attorney and Hamedí's testimony.⁶⁰

Another familiar situation arises when the court notifies the attorney of a critical filing deadline, and the attorney fails to take action or to notify the client, in so doing forfeiting the client's opportunity to pursue the claim.⁶¹ Some courts have held that the due process notice requirement is satisfied even if the client was never actually informed of receipt of relevant documents; hence relief from counsel's errors may not be available on due process or other grounds.⁶² Had the client proceeded in such circumstances without counsel, at least she would have had access to basic information about her case.

Disregard of court deadlines is also not uncommon at the appellate level. *Singh v. Demore* provides a prime illustration. Singh, an Indian citizen seeking asylum on account of his claimed support of the Sikh independence movement, sought to appeal the denial of his asylum application to the Ninth Circuit. He retained an attorney, who promised to file a timely appeal.⁶³ As the filing deadline approached, Singh repeatedly attempted to contact his lawyer. Singh's final email, excerpted in the Ninth Circuit's opinion, urged his counsel to file the appeal as agreed: "I haven't got any response from you regarding appeal to 9th circuit court before August 9, 2002. Given how INS is treating immigrants like me these days, makes me very worried. Please let me know when you [sic] planning to file for appeal?"⁶⁴ The very day the appeal was due, the lawyer finally wrote to Singh: "It would be a waste of time, money and energy to file an Appeal with the 9th

Circuit. All that would do is have another court deny your case. However, there is another way we can help you. I will contact you over the weekend regarding what has to be done."⁶⁵ Despite continuing assurances from Singh's lawyer that his "case was being taken care of" and that Singh was not "at risk of deportation," he was ordered to surrender, which he did, and was taken into custody to await deportation. Ultimately, after Singh retained a different attorney, the Ninth Circuit remanded the case to the BIA to reconsider Singh's application in light of his ineffective-assistance-of-counsel claim.

The lawyers who are the subject of ineffectiveness challenges in the federal courts of appeals—such as those retained by Singh, Hamed, and Yang—handle a large volume of immigration matters; as a result, the ineffective counsel opinions authored by federal appellate courts offer a window into a much broader problem than is presented in these individual cases. In *Morales Apolinar v. Mukasey*, for example, the Ninth Circuit observed that Morales's attorney had been repeatedly warned about his unacceptable comportment in other cases in immigration court.⁶⁶ Reflecting the widespread impact of such ineffectiveness, the opinion quotes a telling admonishment by an immigration judge: "[H]e's overbooked. Most attorneys have maybe one or two hearings set. He has anywhere from six to ten set each morning or afternoon, and he's all over this courthouse. The result is his clients are not represented in court."⁶⁷ In multiple cases, immigration judges elsewhere complained that every one of this attorney's cases "is a problem," that his pleadings were among the "shoddiest" submitted, that he was "taxing the system," and that he was exhibiting "complete irresponsibility."⁶⁸

In *Yang v. Gonzales*, the Second Circuit took into account that Yang's attorney had been charged with "forty-three counts of professional misconduct related to his immigration law practice."⁶⁹ All forty-three counts were ultimately sustained in an opinion finding that this attorney had for five years "purported to specialize in representing illegal immigrants, chiefly from China, who seek political asylum in the United States."⁷⁰ With reference to a New York Appellate Division decision affirming Yang's attorney's disbarment, the Second Circuit recounted the arrangements underlying this lawyer's practice:

[T]hese immigrants [the attorney's clients] are brought into the United States by a series of middlemen known as "snakeheads," who hand the immigrants over to an "agency" when they reach their destination in this country. The immigrant, lacking any knowledge of either the English language or the American legal system, then becomes completely dependent on his "agency," which provides him with a job, a place to sleep, translators, and legal representation in immigration matters. The non-lawyer "agency" generally performs the actual legal work, and retains an attorney to front for it in the Immigration Court. An attorney retained by an "agency" to represent an illegal immigrant client generally has little or no contact with the

client, exercises no control over the case, and serves at the pleasure of the "agency" which pays his fee. The Referee concluded that [Yang's attorney] lent himself to this "insidious system."⁷¹

In yet another case, which was remanded on the basis of an ineffective-assistance-of-counsel claim, the Ninth Circuit in *Tinoco-Aguilera v. INS* noted that the ineffective counsel "was the same attorney who was the subject of our opinion in *Castillo-Perez* and who resigned from the State Bar of California . . . with charges pending against him."⁷² At the time of his resignation, the attorney faced seventy-one counts of misconduct relating to his work on immigration cases and had been recommended for disbarment.⁷³

All indications are that such incompetence impacts hundreds if not thousands of individuals and leads, in repeated instances, to the forfeiture of avenues for relief as well as to the unnecessary multiplication of proceedings. Morales's ineffective attorney alone handled more than twenty-seven hundred immigration cases in a two-year period.

If such ineffective and sometimes exploitative counsel were somehow identifiable and segregable from the statistical analysis of counsel undertaken in *Refugee Roulette*, it is probable that the presence of competent counsel would affect outcomes even more dramatically than the study's analysis of the impact of counsel presently suggests. Lawyers differ markedly in the amount of time and money they are able to invest in a case, and particularly in the painstaking factual research required to corroborate a client's claims, often including obtaining affidavits and other documents from eyewitnesses in the respondent's home country.⁷⁴ Whether the grant rates for all competent counsel would be as high as that of Georgetown University Law School's asylum clinic, or for applicants represented pro bono by large law firms (roughly 90 percent) is unknown,⁷⁵ primarily because it is unclear how much some degree of selection bias explains these disproportionately higher grant rates, and how much the quality of lawyering is the driving causal force. Similarly, the inordinately low grant rate for those without legal counsel in the study (16.3 percent) may be partially explained by selection bias in the other direction (that is, some of these may be cases that, after assessing the merits, no pro bono or other counsel would pursue).

While defining and identifying precisely what constitutes competence on the part of counsel would be no simple undertaking, an examination of ineffectiveness cases such as those described here elucidates that at least some minimal level of competence of counsel rather than the presence of counsel alone makes the critical difference in immigration proceedings. In other words, these cases strongly suggest that the positive effects of high-quality counsel on outcomes are considerably in excess of those identified by the authors of the *Refugee Roulette* study; and the especially negative effects of representation by ineffective coun-

sel importantly bear on immigration case outcomes, and more generally on the administration of justice.

It is worth acknowledging again that many immigration attorneys work carefully, zealously, and competently on their clients' behalf. Many others who may fall short of standards of professional competence probably mean well but are overwhelmed by the same structural factors that engulf the immigration courts and federal circuit courts. Calling attention to this systemic stress, perhaps inadvertently, one immigration attorney, a possibly well-intentioned though hapless lawyer who was threatened with discipline as a consequence of his careless work on immigration appeals, agreed with the criticisms of his deficiencies: "Some attorneys, including myself," he acknowledged, "do not spend enough time. We're not trained properly in terms of federal appeals. I ventured into an area I found later was very demanding. I was probably not qualified to do the job."⁶⁴ This lawyer's clients, whom he charged a flat fee of twenty-five hundred dollars for an appeal, are mostly poor and could not afford the more sizable fees charged by elite law firms. The attorney confessed that he felt "ashamed" and understood he had "no excuse": "[e]ven if you don't charge a lot of money, you have to do your job."⁶⁵

Immigration attorneys working for the government are not without blame either when it comes to deficient performance in the face of heavy caseloads. One need not look far into federal appellate case law of recent years to find instances of government counsel being chastised for submitting legally inaccurate arguments and factually misleading information.⁶⁶ As is the case with some of the lawyers representing immigrants, these failings may be, in part, the consequence of a system stretched to the breaking point.

IV. Fraud and the Unauthorized Practice of Law

Adding to the problems posed by ineffective, though licensed, immigration lawyers, each year thousands of individuals are defrauded by disbarred attorneys, "notarios" or "immigration specialists,"⁶⁷ who mislead their clients to believe they are attorneys or who pretend to have special immigration expertise.⁶⁸ Trade-in fraudulent documents and extortionist fees charged by so-called immigration specialists are recurring complaints. In *Aberin v. Gonzales*, the lead petitioner was told by Mendoza, a nonattorney pretending to be a lawyer, that lawful permanent residence status could be obtained for the entire family for twenty-eight thousand dollars.⁶⁹ After being paid, Mendoza gave the lead petitioner passports with I-55 stamps and informed him that the family need not appear at their hearing because they had all become lawful permanent residents. The stamps, as it turned out, were official government stamps, but had been procured through illegitimate means. The family was ordered deported in absentia.

In another illustrative case, *Ahmed v. Gonzales*, Ahmed's "counsel" promised to file "something," despite the thirty-day window for a motion to reopen having closed. Ahmed then retained another "counsel," who turned out not to be an attorney and who did nothing to advance the case and delayed in turning over Ahmed's file when the relationship terminated.⁷⁰ Only when his third counsel received Ahmed's file did he become aware of the "immigration specialists" misrepresentations and misconduct.

Similarly, in *Fajardo v. INS*, Normita Fajardo, a native of the Philippines, hired an "immigration paralegal" to handle her case.⁷¹ After receiving notice that Fajardo's application had been denied, the paralegal failed to inform Fajardo of her deportation hearing date. When Fajardo failed to appear for the hearing, she was ordered deported in absentia. Upon learning of her deportation order, Fajardo sought the assistance of another immigration specialist, who though not a lawyer indicated he could help her. She paid this second consultant one thousand dollars. When her untimely appeal was denied because her representative missed the filing deadline, she finally hired an attorney. Like Ahmed, only then did Fajardo become aware of the misconduct to which she had been subjected.⁷²

Federal and state prosecutors have begun to pursue criminal charges against disbarred immigration attorneys, fraudulent lawyers, and "immigration specialists" who have committed crimes in the course of their "representation." For instance, Mendoza, the nonlawyer in *Aberin v. Gonzales*, was sentenced to nine years in prison.⁷³ In another case involving a disbarred attorney, a former San Jose, California, lawyer was charged with giving immigration advice and preparing legal documents without a license as well as four counts of grand theft.⁷⁴ The former attorney had a record of disciplinary measures challenging his competence and had resigned from the California Bar, but continued to charge clients fees for immigration legal counsel. Ultimately, he was arrested at his "law" office.

V. Programs Devoted to Improving Access to Quality Counsel

Although discipline may play a role in rooting out fraudulent and unethical representatives, these avenues do not address the broader need to enhance the availability of competent counsel. We now consider a range of programs that focus on training and attorney recruitment.⁷⁵ Our nonexhaustive account emphasizes initiatives engaged concurrently in training and mentoring alongside recruitment of new immigration counsel, with the simultaneous goals of expanding the number of counsel and enhancing their substantive expertise. While these various programs are relatively small-scale efforts that merely begin to address the large numbers of unrepresented cases in the system, these initiatives still constitute an

important initial attempt to respond to the critical need for available and effective representation in immigration proceedings.

In response to the increasing number of immigration cases over the past decade, some of the circuit courts have become active in training immigration counsel. Enhanced training is a first step to address problems of both ethical violations and incompetent advice and practice. Even as ethics training is not a panacea for outright fraud and greed, the inclusion of an ethics module in every continuing legal education program on immigration would start to address the issue of ethical breaches. Training in substantive immigration law and practice likewise offers a means of tackling problems related to the quality and quantity of counsel.

For the past six years, the Ninth Circuit has been affirmatively involved in training counsel for both immigrant petitioners and the government. In conjunction with various bar groups, each year the court sponsors several sessions aimed at both new and experienced immigration counsel. One of the distinctive programs provides participants the opportunity to participate in small-group and individual meetings that include drafting a brief and obtaining constructive feedback from experienced counsel and judges. The program showcases model appellate arguments and briefs. The court's website includes a comprehensive immigration outline that is easily accessible to all practitioners.⁹⁸ The Ninth Circuit also administers a pro bono program that appoints counsel in immigration cases. In the last several years, counsel has been appointed in more than two hundred cases. In exchange for their service, participating attorneys are guaranteed an appellate argument.

In 2005, Judge Edward Becker of the Third Circuit, now deceased, created a training program in conjunction with the Pennsylvania Bar Institute, "Representing Asylum Seekers in the Circuit Courts." More recently, the New York Bar Council, in cooperation with Judge Katzmann, has begun to explore pro bono and training programs for the Second Circuit.

While the immigration trial courts do not sponsor any pro bono programs, some individual courts spearhead initiatives to address competence and representation concerns. The BIA coordinates a formal pro bono appeals program; the BIA Pro Bono Project, which has offered counsel in more than 550 appeals since 2001. In cooperation with the BIA Clerk's Office, the project identifies cases for possible pro bono representation in accord with criteria determined by partnering nongovernmental organizations (NGOs).⁹⁹ Attorney "screeners" drawn from various NGOs then review the cases to determine which are most suitable for available pro bono counsel; these cases are then distributed to pro bono representatives throughout the country.¹⁰⁰ Those who ultimately accept cases through the project receive copies of the court record, and in most instances, additional time

to file appeal briefs.¹⁰¹ The BIA reports that legal representation in these cases has had a marked positive impact: an internal evaluation in 2004 concluded that the project met its original goals of increasing the level and quality of pro bono representation before the Board.¹⁰²

Since 2000, the Department of Justice, through its Legal Orientation and Pro Bono Program, "has worked to improve access to legal information and counseling and increase rates of representation for immigrants appearing before the Immigration Courts and the . . . BIA."¹⁰³ The Legal Orientation Program provides group and individual sessions to detained individuals in various jurisdictions. EOIR also sponsors a "Model Hearing Program," which aims to improve the quality of advocacy in the immigration courts through small-scale mock-trial training involving immigration judges and experienced counsel.

These judicial efforts have been enhanced by dialogue between the judges of the immigration courts and the circuit courts. In one notable instance, the Federal Judicial Center, in conjunction with Georgetown University Law Center, sponsored a program in 2006, "Immigration Law for Judges of the U.S. Court of Appeals," that brought together immigration judges, BIA members, circuit judges, and immigration law experts.

Another set of programs focused both on training and attorney recruitment is managed by the ABA. The ABA coordinates three organizational efforts in South Texas, Seattle, and San Diego dedicated to enlisting the cooperation of significant numbers of pro bono immigration counsel and training and mentoring immigration lawyers.

The ABAs South Texas Pro Bono Asylum Representation Project (ProBAR) is a national effort to provide pro bono legal services to asylum seekers detained in South Texas" and to this end the "project recruits, trains and coordinates the activities of volunteer attorneys, law students and legal assistants."¹⁰⁴ The Seattle program, the Volunteer Advocates for Immigrant Justice, "offers free legal services to detained immigrants seeking asylum or other forms of legal relief before the immigration courts."¹⁰⁵

The Immigration Justice Project (IJP) of San Diego, created in 2007, is the ABA's newest project.

The mission of the IJP is to promote due process and access to justice at all levels of the immigration and appellate court system, through the provision of high-quality pro bono legal services for those in immigration proceedings in San Diego. Partnering in the project are several ABA entities,[] the Executive Office for Immigration Review (EOIR), the federal courts, Georgetown University Law Center's Institute for the Study of International Migration (ISIM), the American Immigration Lawyers Association, and the private bar. The IJP serves both detained and non-detained individuals, and recruits, trains, and mentors volunteer

attorneys and law students representing clients. Through funding from the EOIR, the IJP also implements a Legal Orientation Program for adult immigration detainees.⁹⁶

The IJP operates by screening unrepresented immigration cases at the San Diego district detention facility and following nondetained Master Calendar hearings at the immigration court. These cases are then assigned to volunteer attorneys predominantly from major law firms. The volunteer attorneys are trained in the applicable immigration law and are paired with experienced immigration attorney mentors to whom volunteers can address questions about their assigned cases. The San Diego project includes a unique academic study as well: during the first two years of the project, Georgetown University social scientists will evaluate the impact of quality representation on individual case outcomes, the immigration court, and the appellate process.⁹⁷

As a supplement to these initiatives, the ABA Commission on Immigration has recently created, through an organizational partnership, an "Immigration Advocates Network," which "is a collaborative effort of leading national immigration advocacy organizations designed to increase access to justice for low-income immigrants." In particular, the network "provides free, easily accessible and comprehensive online resources on a password-protected website for non-profit immigration advocates, organizers, and service providers."⁹⁸ Further, the ABA and the American Law Institute provide, at minimal cost, video resources for immigration training available to law firms, bar associations, public interest lawyers, and not-for-profit service organizations.⁹⁹

The American Immigration Lawyers Association (AILA) administers a series of initiatives as well, invested simultaneously in enhancing the quantity and quality of available immigration counsel. AILA has created a pro bono coordinator position in its chapters around the country to facilitate various opportunities for qualified lawyers to work on a pro bono basis on a range of matters for indigent noncitizens in immigration proceedings.¹⁰⁰ AILA also directs, in association with the American Immigration Law Foundation, the Legal Action Center, staffed by experienced immigration litigators and other practitioners who produce practice advisories on a number of topics, offer individualized nationwide advice and technical assistance to immigration counsel, and conduct impact litigation to promote fairness for immigrants, their families, and their employers.¹⁰¹

Alone, pro bono, legal-resources, and training programs such as these and others do not provide a solution to the severe problems of underrepresentation and poor-quality representation in immigration proceedings. Particularly at the trial level, very little has been done to address problems in the quality of representation. Sadly, many failures at the trial level are incapable of being corrected on appeal, because few immigrants can afford an appeal and even in

those matters that are appealed, the record has been made and the evidence of ineffectiveness warranting a remand and opportunity to supplement the record may be scarce.

Conclusion

Ultimately, the primary challenge in expanding training, pro bono, and other immigration-counseling programs is the limited availability of resources. As these programs continue to produce demonstrated improvements, both for individual immigrants and in the administration of justice for the immigration legal system, we expect that the significance of competent representation will become ever more apparent.

Of the many issues identified in the Refugee Roulette study—inconsistent adjudication, risk of error, prolonged detention in sometimes inhumane conditions, and ambiguous and complicated laws—effective representation for individual immigrants provides only a partial solution. Still, increasingly widespread high-quality representation will probably incrementally and indirectly exert a positive influence on each of these problems, as well as contribute to improved fairness and efficiency in immigration litigation.

NOTES

1. M. Margaret McKeown serves as U.S. Circuit Judge on the United States Court of Appeals for the Ninth Circuit. Allegra McLeod, an Arthur Liman Fellow at the American Bar Association's Immigration Justice Project in San Diego, served as a law clerk to Judge McKeown, 2006–2007, and earned her J.D. at Yale Law School, 2006, and Ph.D. at Stanford University, 2008. The views expressed in this essay are personal to the authors and do not reflect the position of the United States Court of Appeals for the Ninth Circuit; nor do the authors necessarily endorse the analysis, conclusions, and policy prescriptions presented by the principal authors of this book or by other contributors.
2. See *Morales Apolinar v. Mukasey*, 514 F.3d 893, 894–98 & n.4 (9th Cir. 2008) (quoting *In re Valinoti*, No. 96-O-08095, 2002 WL 31907316 (Cal. Bar Ct. Dec. 31, 2002)).
3. See *United States v. Scott*, 394 F.3d 111, 113–21 (2d Cir. 2005).
4. See chapter 3, page 45 (confirming earlier studies reporting the strong correlation between the retention of legal representation and favorable immigration court outcomes for asylum seekers); see also Donald Kerwin, *Revisiting the Need for Appointed Counsel*, in *Insight (Migration Policy Inst., Washington D.C.)* Apr. 2005, No. 4, at 1, available at http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf.
5. See chapter 3, page 45.
6. See U.S. Department of Justice, Executive Office for Immigration Review, FY 2006 Statistical Year Book, Feb. 2007, at G1, available at <http://www.usdoj.gov/eoir/statspub/fy06syb.pdf>.
7. See Andrew I. Schoenholtz & Hamutl Bernstein, *Improving Immigration Adjudications through Competent Counsel*, 21 *Geo J. Legal Ethics* 55 (2008).
8. See chapter 3, page 45 ("[T]he data do not take into account the quality of representation.").

9. Whereas the principal authors have focused exclusively on asylum cases, our analysis addresses immigration litigation more generally.
10. See Dada v. Mukasey, 128 S.Ct. 2307 (2008) (holding that an alien may withdraw a petition for voluntary departure before expiration of the departure period); Gonzales v. Duenas-Alvarez, 549 U.S. 185 (2007) (regarding the removal of an alien for a "theft offense" under 8 U.S.C. § 1101(a)(43)(G)); United States v. Resendiz-Ponce, 549 U.S. 102 (2007) (addressing specificity required in an allegation of illegal reentry under 8 U.S.C. § 1326(a)); Lopez v. Gonzales, 549 U.S. 47 (2006) (defining an "aggravated felony" sufficient to trigger removal under 8 U.S.C. § 1101(a)(43)(B)).
11. See Administrative Office of the U.S. Courts, 2007 Annual Report of the Director: Judicial Business of the United States Courts 98 (2008), available at <http://www.uscourts.gov/judbus2007/JudicialBusiness.pdf> [hereinafter 2007 Judicial Business].
12. See American Bar Association Annual Meeting, Presidential Showcase CLE Program, Aug. 10, 2008, New York City.
13. See Robert A. Katzmann, The Legal Profession and the Unmet Needs of the Immigrant Poor, 21 Geo. J. Legal Ethics 3, 5 (2008) (citing Donald Kerwin, Charitable Legal Programs for Immigrants: What They Do, Why They Matter, and How They Can Be Expanded, Immigration Briefings 1 (2004)).
14. Simultaneous to the upsurge in cases, the number of BIA judges was reduced from twenty-three to eleven. On December 7, 2006, the number of BIA judges was increased to fifteen. See 8 C.E.R. § 1003.4(a)(1) (2006). The Department of Justice explained that the increase was necessary to handle an "extremely burdensome" and potentially "overwhelming" caseload. See BIA: Composition of Board and Temporary Board Members, 71 Fed. Reg. 70,855 (2006) (finalized by 73 Fed. Reg. 33,875 (2008)) (stating that the number of filings with the Board increased from 35,000 appeals and motions in 2002 to 42,700 in 2005). As of September 2008, thirteen members have been appointed to the Board. See Press Release, EOIR, Fact Sheet: BIA Biographical Information (September 2008), available at <http://www.usdoj.gov/eoir/fs/biabios.htm> (listing thirteen members).
15. See, e.g., Carolyn Kolker, Swamped with Asylum Cases, Federal Appeals Judges Take Aim at Immigration Courts, American Lawyer, Feb. 2006, at 72-73.
16. See Andrew I. Schoenholtz & Hamurul Bernstein, Improving Immigration Adjudications through Competent Counsel, 21 Geo. J. Legal Ethics 55, 57-58 (2008) (citing Administrative Office of the U.S. Courts, Judicial Business of the U.S. Courts 2006, at 115 tbl.B-3 (2006), available at <http://www.uscourts.gov/judbus2006/appendices/b3.pdf>).
17. See Tony Mauro, Circuit Judges Decry Immigration Case Tsunami, Legal Times, Aug. 12, 2008 (quoting Judge McKeown).
18. From 2003 to 2007, the circuit courts received 53,028 appeals from the Board of Immigration Appeals. See 2007 Judicial Business, *supra* note 11, at 98. Of these, the Second Circuit received 12,080 (approximately 23%), and the Ninth Circuit 26,299 (approximately 50%). *Id.* at 99, 112.
19. The Ninth Circuit encompasses nine western states, Guam, and the Northern Mariana Islands, has international borders with Mexico and Canada, and has a vast maritime border.
20. Compare 2007 Judicial Business, *supra* note 11, at 102 (chart showing appeals from Board of Immigration Appeals constituting 5,862 of 14,636 total appeals in 2006) with Administrative Office of the U.S. Courts, 2004 Annual Report of the Director: Judicial Business of the United States Courts 92 (2005), available at <http://www.uscourts.gov/judbus2004/appendices/b3.pdf> [hereinafter 2004 Judicial Business] (chart showing that total appeals from administrative agencies to Ninth Circuit, which includes immigration appeals, comprising just 1,063 of 10,342 total appeals in 2001).

21. See 2007 Judicial Business, *supra* note 11, at 102.
22. The Second Circuit's territory borders Canada and is comprised of the states of Connecticut, New York, and Vermont.
23. Compare 2004 Judicial Business, *supra* note 20, at 89 (chart showing appeals from all administrative agencies, including immigration appeals, comprising 184 of 4,519 total appeals to the Second Circuit in 2004) with 2007 Judicial Business, *supra* note 11, at 99 (chart showing appeals from Board of Immigration Appeals comprising 2,177 of 6,334 total appeals to the Second Circuit in 2007).
24. Cf. Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, chapter 12, page 251 ("[M]ore dramatic inroads into adjudicative inconsistency bear costs that . . . are socially unacceptable. The major cost is the erosion of decisional independence, but there are others as well.")
25. See Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).
26. See Biwot v. Gonzales, 403 F.3d 1094, 1098 (9th Cir. 2005).
27. See Katzmann, *supra* note 13.
28. See Aris v. Mukasey, 517 F.3d 595, 600 (2d Cir. 2008). We recognize also, as Daniel M. Kowalski has noted, that while many noncitizens in the United States have little material wealth or education, hundreds of thousands of noncitizens "who visit, study, work and live in the U.S. . . . are fluent in English and other languages as well, . . . are highly educated, cultured, and sophisticated, and . . . well-traveled and economically self-sufficient if not prosperous or even wealthy." See Kowalski, Things to Do While Waiting for the Revolution, 21 Geo. J. Legal Ethics 37, 37 n.4 (2008) (citing John Buchanan, *Lost in the Shadows: the Remarkable Untold Story of America's Affluent Illegal Immigrants*, *Aventura*, Oct. 2007, at 129).
29. See, e.g., *Iuribarria v. INS*, 321 F.3d 889, 901 (9th Cir. 2003) ("One reason that aliens . . . retain legal assistance in the first place is because they assume that an attorney will know how to comply with the procedural details that make immigration proceedings so complicated.")
30. See *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987) (quoting Elizabeth Hull, *Without Justice for All: The Constitutional Rights of Aliens* 107 (1985)).
31. See *Castro-O'Ryan*, 847 F.2d at 1312.
32. See email from Judge Juan Osuna to Judge M. Margaret McKeown (Sept. 8, 2008) (on file with authors).
33. See *Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004).
34. See *id.* at 942, 946.
35. See *id.* at 943-44.
36. See *id.* at 948.
37. See *id.*
38. See Justice Earl Johnson, Jr., "And Justice For All": When Will the Pledge Be Fulfilled?, 47 *Judges' Journal* 5, 5 (Summer 2008).
39. See, e.g., *Recinos de Leon v. Gonzales*, 400 F.3d 1185, 1193 (9th Cir. 2005) ("The IJ's opinion—which appears to be an unedited version of a badly transcribed, rambling set of oral observations—is incoherent regarding both the findings made and the legal standards applied.")
40. Cf. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (holding that the Sixth Amendment right to counsel during initial criminal trial proceedings is so fundamental that the Fourteenth Amendment incorporated it against the states); *Douglas v. California*, 372 U.S. 353, 357-58 (1963) (holding that the Fourteenth Amendment requires states that guarantee criminal appellate review to provide counsel in such proceedings).
41. See 8 U.S.C. § 1362 (2000). The right to choose counsel, though it may sound hollow, does mean something: individuals in immigration proceedings must be permitted to proceed with any

licensed attorney that they elect to retain. See *Baltazar-Alcazar v. I.N.S.*, 386 F.3d 940, 949 (9th Cir. 2004) (holding that "the summary disqualification of an entire law firm violates the statutory right to counsel of choice").

42. See 516 F.2d 565, 568 (6th Cir. 1975) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)).

43. See *Nore, A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 Harv. L. Rev. 1544, 1549 (2007).

44. See, e.g., *Mustata v. U.S. Dept. of Justice*, 179 F.3d 1071, 1022 n.6 (6th Cir. 1999); *Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7th Cir. 1993); *Magallanes-Damian v. INS*, 783 F.2d 931, 933 (9th Cir. 1986).

45. See 521 F.2d 194, 198–99 (5th Cir. 1975) (recognizing potential right to effective assistance of counsel and reopening of proceedings, but concluding that the petitioners had not alleged facts sufficient to permit the inference that competent counsel would have resulted in a different outcome).

46. See, e.g., *Chmakov v. Blackman*, 266 F.3d 210, 215–16 (3d Cir. 2001); *Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001); *Akinwunmi v. INS*, 194 F.3d 1340, 1341 (10th Cir. 1999) (per curiam); *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir. 1999); *Mojilovic v. INS*, 156 F.3d 743, 748 (7th Cir. 1998); *Salih v. Dept. of Justice*, 962 F.2d 234, 241 (2d Cir. 1992); *Figueroa v. INS*, 886 F.2d 76, 78–81 (4th Cir. 1989); *Lozada v. INS*, 857 F.2d 10, 13–14 (1st Cir. 1988); *Magallanes-Damian v. INS*, 783 F.2d 931, 933–34 (9th Cir. 1986).

47. See 19 I. & N. Dec. 637 (B.I.A. 1988). These requirements include the filing of an affidavit describing the agreement between the client and attorney as well as the specific manner in which the attorney's performance was deficient. The client is to inform the attorney of the complaint and provide the attorney an opportunity to respond; in addition, if the attorney is alleged to have committed ethical or legal violations, the client must either file a complaint with the appropriate disciplinary body or explain why he or she has not done so. In the federal courts of appeal, "[c]hese factors are not rigidly applied, especially when the record shows a clear and obvious case of ineffective assistance." See *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002).

48. See, e.g., *Lara v. Trominski*, 216 F.3d 487, 498 (5th Cir. 2000); *Lara v. INS*, 204 F.3d 1241, 1246 (9th Cir. 2000); *Esposito v. INS*, 987 F.2d 108, 110 (2d Cir. 1993).

49. See, e.g., *Calderon-Huete v. Ashcroft*, 107 Fed. Appx. 82, 83 (9th Cir. 2004) (ineffective assistance of counsel reopening on grounds of attorney's failure to inform client that appeal had been dismissed and subsequent abandonment of case); *Rabiu v. INS*, 41 F.3d 879, 883 (2d Cir. 1994) (ineffective assistance of counsel reopening due to attorney's failure to file for discretionary relief for which client was eligible).

50. See *Matter of Compean*, 24 I. & N. Dec. 710 (A.G. 2009).

51. See *id.* at 727, 732. In order to warrant a favorable exercise of discretion under *Compean*, a petitioner must establish (1) that the attorney's failings were egregious; (2) that the petitioner exercised "due diligence" in attempting to address the alleged deficient performance; and (3) that "but for" the attorney's deficient performance "it is more likely than not that the [petitioner] would have been entitled to the ultimate relief he was seeking." *Id.* at 733–34.

52. 8 C.F.R. §§ 1003.1(d)(2)(iii), 1003.1(d)(5); 1003.101–106, 1292.3.

53. See U.S. Dept. of Justice, Executive Office for Immigration Review, List of Currently Disciplined Practitioners, available at <http://www.usdoj.gov/eoir/profcond/chart.htm>.

54. 8 C.F.R. § 1003.102.

55. See *Ariz v. Mukasey*, 517 F.3d 595, 600 (2d Cir. 2008).

56. 478 F.3d 133 (2d Cir. 2007).

57. *Id.* at 143. Incidentally, Yang's lawyer is one of the main protagonists in Professor Richard L. Abel's article on immigration lawyers' neglect of clients and related misconduct. See Richard L. Abel, *Practicing Immigration Law in Filene's Basement*, 84 N.C. L. Rev. 1449, 1452–76 (2006).

58. 478 F.3d at 142.

59. 247 Fed. Appx. 874, 875 (9th Cir. 2007). The reader may notice that we cite unpublished cases in this essay, and the Refugee Roulette study's statistics on U.S. courts of appeals cases also included unpublished decisions. Published opinions generally address significant or novel legal issues, whereas unpublished decisions routinely address the application of settled law to a variety of factual situations. In the immigration context, unpublished federal appellate cases are valuable resources for policy and scholarly research because they reveal patterns that arise repeatedly, but may otherwise go unnoticed because they do not necessarily involve precedential legal issues.

60. See *id.*

61. See, e.g., *Tinoco-Aguilera v. INS*, 73 Fed. Appx. 946 (9th Cir. 2003) (petitioners hired attorney who then failed to file timely application for suspension of deportation and attorney was later disbarred for seventy-one counts of similar misconduct in other immigration cases).

62. See, e.g., *Anin v. Reno*, 188 F.3d 1273, 1277 (11th Cir. 1999) (holding that the due process notice requirement and all statutory rules are satisfied by an attorney's receipt of notice through certified mail, even if the immigrant client never receives actual notice).

63. See 150 Fed. Appx. 639, 640 (9th Cir. 2005).

64. See *id.* at 640.

65. See *id.*

66. See 514 F.3d 893, 897 n.5 (9th Cir. 2008).

67. *Id.*

68. *Id.*

69. 478 F.3d at 138.

70. *Id.* at 138–39.

71. 478 F.3d at 139 (quoting *In re Muto*, 291 A.D.2d 188, 739 N.Y.S.2d 67, 69 (N.Y. App. Div. 2002)).

72. 73 Fed. Appx. 946, 947 (9th Cir. 2003) (internal citations omitted).

73. *Id.*

74. For qualitative descriptions of two very different models of representation, compare the descriptions of the overcommitted attorneys who represented Morales and Yang with the work of the law student representatives described in David Ngaruri Kenney & Philip G. Schrag, *Asylum Denied: A Refugee's Struggle for Safety in America* (2008), pages 95–161.

75. See chapter 3, pages 45–46.

76. See Adam Lipstak, *The Verge of Expulsion, the Fringe of Justice*, New York Times, Sidebar, April 15, 2008.

77. See *id.*

78. See, e.g., *Yi-Tu Lian v. Ashcroft*, 379 F.3d 457, 459–60 (7th Cir. 2004) (noting misstatements and "disingenuous" legal arguments presented by immigration lawyers for the government).

79. Such "specialists," who are not authorized to practice in immigration court, should be distinguished from "accredited representatives," who are employed by nonprofit organizations and "approved by the Board of Immigration Appeals to represent aliens before the Board, the Immigration Courts, and the Department of Homeland Security." See Executive Office for Immigration Review, Immigration Court Practice Manual Ch. 2.4 (2008); see also 8 C.F.R. §1292.1(a)(4), 1292.2(d).

Methodological Appendix

I. Benchmarks for Counting and Comparing the Number of Outlying Adjudicators

In order to evaluate consistency within an adjudication body, we needed to select a benchmark for counting the number of adjudicators (asylum officers, immigration judges, or appellate judges) who deviated significantly from the mean. To begin, we had to decide whether to measure deviation in terms of the difference from the national mean or the mean for the office in which the adjudicator worked. We decided on the latter standard; therefore, unless otherwise indicated, we measured deviation from a mean for asylum officers only in terms of the mean of the regional office in which the asylum officer works, and deviation from a mean by immigration judges only by measuring their grant rates against the mean grant rate for the judges in the city in which they sit. (In a small number of instances, we compared regions or cities, but these are clearly indicated in the text.) We believe that making local comparisons is appropriate because the national origin of the population of asylum seekers varies considerably from region to region. For example, Haitians and Colombians apply for asylum in much larger proportions in Miami than in other cities. Even when we considered only asylum seekers from one country, those who migrate to one U.S. city may be significantly different from those who migrate to another city (for example, asylum seekers from one province may tend to flee to the East Coast of the United States while those from another province may flee via a different route and end up on the West Coast).

To compute mean regional or city grant rates, we included all cases from the time period of the study. For regional asylum office grant rates, we multiplied each adjudicator's grant rate by the number of cases decided by that adjudicator; the product represented the total of that adjudicator's grants. For immigration court grant rates by city, the data provided by the government included numbers of cases granted. In both cases, we added total adjudicator grants, and then divided that sum by the total number of cases decided on their merits by all adjudicators in the region or city. We reported and evaluated the grant rates of only those adjudicators who decided at least the threshold number of cases reported in the text (one hundred cases in most instances, fifty in others, and twenty-five in

80. See, e.g., Andrew F. Moore, *Fraud, the Unauthorized Practice of Law, and Unmet Needs: A Look at State Laws Regulating Immigration Assistants*, 19 Geo. Immigr. L. J. 1, 2-3 (2004).
81. 170 Fed. Appx. 890 (9th Cir. 2006).
82. 223 Fed. Appx. 633, 634 (9th Cir. 2007).
83. 300 F.3d 1018, 1018 (9th Cir. 2002).
84. *Id.* at 1019.
85. See David Rosenczweig, *Sellers of False Residency Permits Sentenced to Prison*, Los Angeles Times, June 22, 1999, at B-2; see also Press Release, U.S. Dept. of Justice, Hartford Immigration Lawyer Pleads Guilty to Federal Document Fraud Charges (May 9, 2008) (announcing plea of Hartford immigration attorney to document fraud).
86. See Jessie Mangaliman, *Disbarred Lawyer Arrested*, San Jose Mercury News, July 19, 2008 (Local Crime News Section).
87. See Katzmann, *supra* note 13, at 10-19 (describing programs that seek to increase the numbers of attorneys available to represent indigent immigrants facing removal from the United States).
88. See Ninth Circuit Immigration Outline, available at <http://www.ca9.uscourts.gov/cso/Document.nsf> (click on download by topic (order by subject), then scroll to and click on Immigration Outline).
89. See U.S. Dept. of Justice, EOIR Legal Orientation and Pro Bono Program, <http://www.usdoj.gov/eoir/probono/MajorInitiatives.htm>.
90. See *id.*
91. See *id.*
92. See Board of Immigration Appeals, *The BIA Pro Bono Project is Successful* (2004), <http://www.usdoj.gov/eoir/reports/BIAProBonoProjectEvaluation.pdf>.
93. See U.S. Dept. of Justice, EOIR Legal Orientation and Pro Bono Program, <http://www.usdoj.gov/eoir/probono/probono.htm>.
94. ProBar is also sponsored by the State Bar of Texas and the American Immigration Lawyers Association. See ABA, South Texas Pro Bono Asylum Representation Project (ProBAR), <http://www.abanet.org/publicserv/immigration/probar.shtml>.
95. See ABA, Volunteer Advocates for Immigrant Justice (VAIJ), <http://www.abanet.org/publicserv/immigration/vaij.shtml>.
96. See ABA Commission on Immigration, *The ABA Launches the Immigration Justice Projects (IJP) of San Diego*.
97. See *id.*
98. See ABA Commission on Immigration, *Launch of the Immigration Advocates Network*, available at <http://www.abanet.org/publicserv/immigration/home.html>; see also Immigration Advocates Network, *Welcome to the Immigration Advocates Network*, <http://www.immigrationadvocates.org>.
99. See ALL-ABA, *Best Practices in Representing Asylum-Seekers: A Video Resource for Pro Bono Attorneys*, available at <http://www.ali-aba.org/aliaba/rtdvd01.asp>.
100. See, e.g., AILA Chicago Chapter, *Chapter Pro Bono Programs*, <http://www.aila.org/con- tent/default.aspx?docid=20441>.
101. See American Immigration Law Foundation, *AILF Legal Action Center*, http://www.aifl.org/lac/lac_index.shtml.

Noferi, Mark (EOIR)

From:

(b) (6)

Sent:

Wednesday, June 28, 2017 12:52 PM

To:

Noferi, Mark (EOIR)

Subject:

Flores order

<https://doc-0k-88->

docs.googleusercontent.com/docs/securesc/ha0ro937gcuc7l7deffksulhg5h7mbp1/7nb03ecs0hf3l5dk5mqgk9d1iivb63v3/1498665600000/00258089302937633759/*/0Bzbrt7_gUPCyT2dsTGVuZ2ljT2lYcG1RMXpzcHczOU5fblBj?e=download

(b) (6)

Noferi, Mark (EOIR)

From: (b) (6)
Sent: Tuesday, July 4, 2017 3:32 PM
To: Noferi, Mark (EOIR)
Subject: AD and Fraud fact sheets

Fraud: <https://www.justice.gov/eoir/page/file/eoirfraudprogramfactsheetjune2017/download>

AD: <https://www.justice.gov/eoir/page/file/eoirfraudprogramfactsheetjune2017/download>

(b) (6)

Noferi, Mark (EOIR)

From: (b) (6)
Sent: Tuesday, July 4, 2017 3:55 PM
To: Noferi, Mark (EOIR)
Subject: NAC training classes

- July 10-12 - Foundations of Leadership for DOJ litigating divisions
- <https://www.justice.gov/usao/training/course-offerings/course-descriptions-2017#C00OLE-LEAD-CS-29>
- Aug. 1 - webinar - influence - <https://www.justice.gov/usao/training/course-offerings/course-descriptions-2017#C00OLE-LEAD-CS-47>
- Aug. 15-16 in DC - Managerial Leaders go beyond line editing - <https://www.justice.gov/usao/training/course-offerings/course-descriptions-2017#C00OLE-LEAD-CS-30>
- Jan. 9-12 - criminal immigration prosecutions- can someone from Fraud team go? <https://www.justice.gov/usao/training/course-offerings/course-descriptions-2018#C00OLE-NS-CS-87>
- 2/13-2/18 - staffing and recruitment- TBD - <https://www.justice.gov/usao/training/course-offerings/course-descriptions-2018#C00OLE-EOUSA-CS-179>
- 2/27-3/1 - sr. litigation counsel conf - <https://www.justice.gov/usao/training/course-offerings/course-descriptions-2018#C00OLE-CVL-CS-25>
- 4/11-4/13- legal issues for USAO managers- N/S if USAO specific- <https://www.justice.gov/usao/training/course-offerings/course-descriptions-2018#C00OLE-LGLP-CS-17>

(b) (6)

Noferi, Mark (EOIR)

From: (b) (6)
Sent: Sunday, July 9, 2017 10:32 AM
To: Noferi, Mark (EOIR)
Subject: The Immigration Courts: A Conversation with Juan Osuna, Former EOIR Director - The Center for Migration Studies of New York (CMS)

Follow Up Flag: Follow up
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<http://cmsny.org/event/juanosuna/>

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Noferi, Mark (EOIR)

From: (b) (6)
Sent: Saturday, July 29, 2017 9:14 AM
To: Noferi, Mark (EOIR)
Subject: Immigration Law & Policy – Washington, DC

Immigration Law & Policy – Washington, DC
// **Legal Scholarship Blog**

Georgetown Law, the Migration Policy Institute, and Catholic Legal Immigration Network, Inc., present the 14th Annual Immigration Law & Policy Conference Sept. 25, 2017, at Georgetown Law.

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Noferi, Mark (EOIR)

From:

(b) (6)

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Noferi, Mark (EOIR)

Subject:

Fields on the Plenary Power Doctrine in Immigration Law

[Fields on the Plenary Power Doctrine in Immigration Law](#)

// [Legal Theory Blog](#)

Shawn Fields (University of San Diego School of Law) has posted [The Unreviewable Executive? National Security and the Limits of Plenary Power](#) (Tennessee Law Review, Vol. 84, No. 3, 2017) on SSRN. Here is the abstract:

This Article explores the weakened foundations of plenary power as a coherent doctrine in immigration, and asserts that a continued if limited role for the doctrine exists in the national security context. With reference to recent litigation over the Trump travel bans, the Article calls for a two-tiered level of review of challenged immigration action: 1) a searching evidentiary inquiry regarding the central motivation behind the action, and 2) a more deferential inquiry into the action's constitutionality when the action was driven primarily by national security interests.

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From: (b) (6)
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Subject: Fwd: [immprof] Paxton's lawsuit over 'sanctuary cities' ban dismissed | KVUE.com

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From: Dan Kowalski <dkowalski@david-ware.com>
Date: Wed, Aug 9, 2017 at 9:29 PM
Subject: [immprof] Paxton's lawsuit over 'sanctuary cities' ban dismissed | KVUE.com
To: immprof@lists.ucla.edu <immprof@lists.ucla.edu>

<http://www.kvue.com/news/local/paxtons-lawsuit-over-sanctuary-cities-ban-dismissed/463201265>

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Noferi, Mark (EOIR)

From: (b) (6)
Sent: Sunday, August 13, 2017 7:39 AM
To: Noferi, Mark (EOIR)
Subject: CLINIC: Immigration Court Practitioner's Guide to Responding to Inappropriate Immigration Judge Conduct

[CLINIC: Immigration Court Practitioner's Guide to Responding to Inappropriate Immigration Judge Conduct](#)
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The Catholic Legal Immigration Network (CLINIC) has released, "Immigration Court Practitioner's Guide: Responding to Inappropriate Immigration Judge Conduct." CLINIC describes the purpose of the guide as follows: "As more noncitizens are targeted for the initiation of removal proceedings under the...

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From: (b) (6)
Sent: Saturday, August 19, 2017 7:52 AM
To: Noferi, Mark (EOIR)
Subject: The Complete List of U.S. Visas by Profession and Purpose of Travel

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[The Complete List of U.S. Visas by Profession and Purpose of Travel](#) // [ImmigrationProf Blog](#)

Here is a nice quick and easy description of the various visas under U.S. immigration law: "The Complete List of U.S. Visas by Profession and Purpose of Travel." For related links, see [Opportunity Visa Study](#) [Opportunity Visa Study](#) [Infographic] KJ...

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(b) (6)

From: (b) (6)
Sent: Sunday, August 20, 2017 8:38 AM
To: Noferi, Mark (EOIR)
Subject: 2017 ABA Administrative Law Conference

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In-Person

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Date:

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- * Modernizing Regulation to Accommodate Huge and Disruptive Technologies
- * Agencies Regulating Cyber-security Threats
- * Top Ten Challenges for FDA in 2018
- * Federal Agency Guidance: Its Role in Agency Operations, Industry Compliance and Litigation
- * Are ALJ's Unconstitutionally Appointed, or Are They Mere Employees: The Rock and a Hard Place Posed by the Bandimere and Lucia Decisions
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Noferi, Mark (EOIR)

From: (b) (6)
Sent: Wednesday, August 23, 2017 5:48 AM
To: Noferi, Mark (EOIR)
Subject: Remembering Juan Osuna | Human Rights First

<http://www.humanrightsfirst.org/blog/remembering-juan-osuna>

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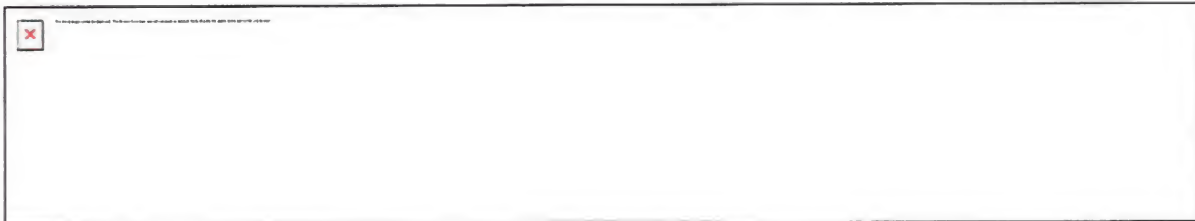
Noferi, Mark (EOIR)

From: (b) (6)
Sent: Monday, September 11, 2017 8:11 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: ACS Upcoming Events; Opportunities and Limits to Prosecutors Seeking Reform (9/20 @9am ET); SCOTUS Preview (9/14 @ 9am ET); Notice and Comment Procedure (9/19 @ 3pm ET)

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From: American Constitution Society (b) (6)
Date: Mon, Sep 11, 2017 at 5:01 PM
Subject: ACS Upcoming Events; Opportunities and Limits to Prosecutors Seeking Reform (9/20 @9am ET); SCOTUS Preview (9/14 @ 9am ET); Notice and Comment Procedure (9/19 @ 3pm ET)
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Upcoming Events

[9/20: The Power to Promote Progress: Opportunities and Limits to Prosecutors Seeking Reform](#)

[9/19: Notice and Comment Procedure: A Critical Oversight Tool](#)

The American Constitution Society
for Law and Policy and the National Bar
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The 2017-2018 Supreme Court Preview

On Thursday, September 14th, ACS will host a panel discussion at the National Press Club where a diverse group of experts will offer their insights on the Supreme Court Term that begins October 2nd. In addition to reviewing key cases on the docket, the discussion will include the impact of Justice Neil Gorsuch's joining the Court for his first full term.

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The Power to Promote Progress: Opportunities and Limits to Prosecutors Seeking Reform

In the last year, a number of progressive prosecutors have been elected in places like Chicago, Houston, Denver, and Orlando, joining the ranks of progressive prosecutors in New York, Shreveport, Albany, Seattle and elsewhere. Reform-minded attorneys are also serving as line prosecutors in federal and state prosecutor offices across the country. These attorneys, many of whom are men and women of color, are seeking to leverage their roles as prosecutors to combat racial and economic disparities in the criminal justice system.

How can prosecutors use their discretion and influence to pursue racial and economic justice? What constraints, both legal and systemic, limit a prosecutor's ability to achieve reform? What are the ethical obligations to pursue prosecutions, even in cases where the law disparately impacts people of color or the economically vulnerable?

Join the American Constitution Society and the National Bar Association on Wednesday, September 20, for a panel of current and former state and federal prosecutors who will discuss the opportunities and challenges of serving as a progressive prosecutor.

Keynote:

Ian Gershengorn, Partner, Jenner & Block LLP; former acting United States Solicitor General

Featured Speakers:

Aramis Ayala, State Attorney, Ninth Judicial Circuit Court of Florida
Lenese Herbert, Professor of Law, Howard University School of Law; former

Constitution in the Classroom

The Washington, D.C. Lawyer Chapter of the American Constitution Society has a few more classrooms available for volunteers for its Fall 2017 Constitution in the Classroom program! These classrooms are available on **Tuesday, September 19** and will go on a first to sign-up basis. No previous teaching experience is necessary. Sample lesson plans, teaching tips, and training calls will be available. *If you are interested in volunteering, sign up [here](#).*



Assistant United States Attorney, District of Columbia

Sonja Ralston, Appellate Attorney, U.S. Department of Justice, Criminal Division

Thiru Vignarajah, Partner, DLA Piper; former Deputy Attorney General, State of Maryland

Roger A. Fairfax, Jr. (*moderator*), Jeffrey and Martha Kohn Senior Associate Dean for Academic Affairs and Research Professor of Law, George Washington University Law School; former Federal Prosecutor, U.S. Department of Justice, Public Integrity Section of the Criminal Division

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9:00 a.m. - 11:30 a.m. EDT

Jenner & Block LLP

1099 New York Avenue, NW, Suite 900
Washington, DC

Breakfast will be served beginning at 8:45 a.m.

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Notice and Comment Procedure:
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Whether you care about environmental regulations, conditions for millions of workers across the country, financial controls, or any number of regulatory issues, please join us for this valuable training seminar on notice and comment procedure with two seasoned experts. This is a key oversight tool for agency activity, particularly in the current political environment, and it's also a great way to develop knowledge in a particular area of

the law. Whether you are an experienced practitioner or a law student still developing your experience, you can participate in notice and comment procedure to bring about change.

Featured Speakers:

Karl Sandstrom, Perkins Coie
Raj Nayak, National Employment Law Project

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Tuesday, September 19, 2017
3:00 PM EDT

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Noferi, Mark (EOIR)

From: (b) (6)
Sent: Friday, September 29, 2017 9:47 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] UAC legal opinion from EOIR GenCou
Attachments: King 9-19-17 UAC TVPRA.pdf

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From: Dan Kowalski <dkowalski@david-ware.com>
Date: Fri, Sep 29, 2017 at 4:24 PM
Subject: [immprof] UAC legal opinion from EOIR GenCou
To: immprof@lists.ucla.edu <immprof@lists.ucla.edu>

Daniel M. Kowalski

Editor-in-Chief

Bender's Immigration Bulletin (LexisNexis)

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U.S. Department of Justice

Executive Office for Immigration Review

Office of the General Counsel

September 19, 2017

MEMORANDUM TO: James R. McHenry III,
Acting Director
Executive Office for Immigration Review

FROM: Jean King, General Counsel, JAL

SUBJECT: Legal Opinion re: EOIR's Authority to Interpret the term Unaccompanied
Alien Child for Purposes of Applying Certain Provisions of TVPRA

I.

You have asked the Office of General Counsel ("OGC") for a legal opinion addressing two issues: (1) whether the Department of Homeland Security's ("DHS") determination regarding an alien's status as an unaccompanied alien child ("UAC") is legally binding on the Executive Office for Immigration Review ("EOIR"); and (2) if an alien had UAC status previously but no longer meets the definition of UAC, does the alien lose the protections of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"). OGC's opinion is that Immigration Judges are not bound by DHS's determination regarding whether a respondent is or is not a UAC. Instead, Immigration Judges may resolve any dispute about UAC status during the course of removal proceedings when such a determination bears on a respondent's eligibility for relief, or as part of a determination regarding the applicability of the initial jurisdiction provision set forth in section 208(b)(3)(C) of the Immigration and Nationality Act ("INA" or "Act"), 8 U.S.C. § 1158(b)(3)(C). It follows that a respondent who was previously designated as a UAC upon apprehension for purposes of placement in removal proceeding and/or an appropriate custodial setting may no longer be eligible for relief under the TVPRA if an Immigration Judge determines that the respondent no longer meets the definition of UAC.

II.

In 2008, Congress enacted the TVPRA as a "comprehensive scheme" designed to provide certain protections for UAC with respect to their apprehension, custody, placement in removal

proceedings, and eligibility for certain forms of immigration relief. *See* 8 U.S.C. § 1232 et seq.; *see also* H.R. Rep. 110-941 at 215-16 (summarizing section 235 of the TVPRA).

Critically, an alien's eligibility for these protections rests on his or her classification as a UAC. The Homeland Security Act (HSA) provides that:

The term unaccompanied alien child means a child who – (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom – (i) there is not parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.

6 U.S.C. § 279(g) (2002). The TVPRA incorporates the definition of UAC contained in the HSA by cross-reference. *See* 8 U.S.C. § 1232(g) (“for purposes of this section the term unaccompanied alien child has the meaning given such term in . . . 6 U.S.C. § 279(g).”).

Several federal departments and agencies share responsibility for implementation of the TVPRA. Components within DHS are responsible for the apprehension and processing of UAC. Upon apprehension, an ICE or CBP officer makes a determination as to whether an alien is younger than eighteen and unaccompanied. *See* 8 U.S.C. § 1232(b)(2). With the exception of children from Mexico and Canada who meet certain criteria, DHS must generally transfer all UAC to the Department of Health and Human Services (“HHS”). 8 U.S.C. § 1232(b)(3). HHS is responsible for the care, custody, and placement of UAC. 8 U.S.C. § 1232(c), 6 U.S.C. § 279(g). The statute also directs that “[t]he Secretary of Health and Human Services, in consultation with the Secretary of Homeland Security, shall develop procedures to make a prompt determination of the age of the alien which shall be used by [DHS and HHS] for children in its custody.” 8 U.S.C. § 1232(b)(4).

The TVPRA contains a number of provisions that directly implicate EOIR's authority. First, any UAC sought to be removed by ICE (except for certain children from Mexico and Canada) are not subject to expedited removal but instead must be placed in removal proceedings before EOIR. *See* 8 U.S.C. § 1232(a)(5)(D). Second, the TVPRA amends the procedures for UAC seeking asylum by transferring initial jurisdiction over such cases from EOIR to the United States Citizenship and Immigration Services (“USCIS”). INA § 208(b)(3)(C), 8 U.S.C. § 1158(b)(3)(C). Third, the TVPRA waives the requirement that a UAC must apply for asylum within one year of arrival to the United States, as well as the bar to applying for asylum if an alien could be removed to a “safe third country.” *See* 8 U.S.C. § 1158(a)(2)(E). Finally, the TVPRA provides that UAC do not have to post bond or prove that they have the financial means to depart the United States in order to qualify for voluntary departure in removal proceedings. *See* 8 U.S.C. § 1232(a)(5)(D).

III.

The Attorney General has not promulgated regulations implementing the TVPRA, nor is there case law explicitly discussing EOIR's authority with respect to administering the statute. Accordingly, the starting point is the language of the statute itself and the context of the governing statute as a whole. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). When interpreting a comprehensive statute such as the TVPRA and the INA, the "goal is to fit, if possible, all parts into a harmonious whole." *Id.* at 133. As a whole, the TVPRA reflects Congress's intent that while DHS is required to make a determination of UAC status for custodial purposes and as a prerequisite to initiating removal proceedings, EOIR's Immigration Judges may exercise their independent adjudicatory role to determine a respondent's status as a UAC when such a determination bears on issues arising during the course of removal proceedings.

Section 1232(g) states that "for purposes of this section the term unaccompanied alien child has the meaning given such term in . . . 6 U.S.C. § 279(g) (emphasis added)."¹ For DHS's purposes, the TVPRA requires certain DHS officers to determine whether an alien meets the definition of UAC upon apprehension to ensure both prompt transfer to HHS and placement in removal proceedings. *See* 8 U.S.C. §§ 1232(a)(3), (b)(3). The TVPRA also requires HHS to develop procedures to determine whether a child in its custody remains a UAC. *See* 8 U.S.C. § 1232(b)(1); 6 U.S.C. § 279(b); *see also D.B. v. Cardall*, 826 F.3d 721 (4th Cir. 2016) (discussing HHS authority).² However, those statutes nowhere state that a DHS or HHS determination regarding UAC status made for these limited purposes is binding on EOIR when such a determination bears on EOIR's adjudicatory authority under section 240 of the Act. To the contrary, the TVPRA contains a number of provisions that explicitly implicate EOIR's authority. Together, these provisions convince us that Immigration

¹ The fact that Congress placed the definition of UAC in 6 U.S.C. § 279, which is DHS's organic statute, does not undermine an Immigration Judge's authority to make a UAC determination when it bears on issues within an Immigration Judge's jurisdiction. Indeed, 6 U.S.C. § 279(c) explicitly states that "nothing in this section may be construed to transfer the responsibility for adjudicating benefit determinations under the Immigration and Nationality Act . . . from the authority of any official of the Department of Justice, the Department of Homeland Security, or the Department of State."

² EOIR does not have any responsibility over the apprehension, physical custody, or decision to place any alien in removal proceedings. *See* 6 U.S.C. § 251 et. seq.; *see also* 8 U.S.C. §§ 1103(a), 1103(g); *see generally Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520 (BIA 2011). Nor does EOIR have any authority over HHS's safety and suitability assessments for UAC. *See* 8 U.S.C. §§ 1232(b)(1); 1232(c)(2),(3); 6 U.S.C. § 279(b).

Judges have independent authority to decide whether a respondent meets the definition of UAC as a prerequisite to resolving certain issues in removal proceedings.

Through section 8 U.S.C. § 1232(a)(5)(D), enacted as a part of the TVPRA, Congress plainly provided that certain UAC are entitled to a determination of their rights and eligibility for relief during a removal proceeding conducted by an Immigration Judge. That section provides that:

Any unaccompanied alien child sought to be removed by the Department of Homeland Security, except for an unaccompanied alien child from a contiguous country ... shall be ... placed in removal proceedings under *section 240 of the Immigration and Nationality Act* (8 U.S.C. 1229a)[.]

During proceedings under section 240 of the Act, an Immigration Judge has jurisdiction to determine whether a respondent is removable and to adjudicate applications for relief from removal, if any. Specifically, section 240 of the Act and its implementing regulations require Immigration Judges to: “conduct proceedings for deciding the inadmissibility or deportability of an alien,” INA § 240(a)(1), 8 U.S.C. § 1229a(a)(1); determine whether a respondent “satisfies the applicable eligibility requirements” for relief from removal; INA § 240(c)(4), 8 U.S.C. § 1229a(c)(4); and “at the conclusion of the proceeding decide whether an alien is removable from the United States.” INA § 240(c)(1), 8 U.S.C. § 1229(a)(c)(1). In exercising this authority, an Immigration Judge “must exercise his or her independent judgment and discretion and take any action consistent with the Act and regulations that is appropriate and necessary for the disposition of such cases.” 8 C.F.R. § 1003.10(b).

Given Congress’s explicit reference in 8 U.S.C. § 1232(a)(5)(D) to removal proceedings under section 240 of the Act, and an Immigration Judge’s broad statutory and regulatory jurisdiction to conduct such proceedings, we conclude that an Immigration Judge has independent authority to decide whether or not a respondent qualifies as a UAC for purposes of disposing of any case coming before the immigration courts. This conclusion is also consistent with the general rule that Immigration Judges have jurisdiction over all matters related to the proper adjudication of a removal case unless such jurisdiction is expressly withheld by an Act of Congress or through a regulation issued by the Attorney General. *See e.g. Matter of Herrera Del Orden*, 25 I&N Dec. 589 (BIA 2011) (“Given the Immigration Judge’s broad overall authority to conduct removal proceedings we conclude that he or she is presumed to have jurisdiction to gather and receive evidence pertinent to an application for relief from removal unless the Attorney General expressly withholds it.”).

Indeed, certain provisions of the TVPRA “necessarily” require a determination regarding UAC status as incidental to determining whether a respondent “satisfies the applicable eligibility

requirements” for relief from removal. Section 208(a)(2)(E) of the INA, 8 U.S.C. § 1158(a)(2), which was added by the TVPRA is one such provision. That statute provides that UAC shall not be subject to the one-year time bar and/or the “safe third country” limitation for asylum applications. In all cases, involving asylum, an Immigration Judge must determine whether the respondent “satisfies the applicable eligibility requirements” for asylum. *See* INA § 240(c)(4)(A); *see also* 8 C.F.R. § 1240.1(a)(1)(ii) (stating in any removal proceeding pursuant to section 240 of the Act the Immigration Judge shall have authority to determine applications under section 208). To the extent that an Immigration Judge has jurisdiction over the adjudication of an asylum application filed by a potential UAC, this statute must be read as requiring the Immigration Judge to make a determination regarding UAC status as a prerequisite to granting asylum where the one year bar or safe-third country limitation would otherwise be implicated. A contrary interpretation could result in EOIR issuing asylum benefits and rights to respondents who are otherwise statutorily ineligible for them.

Moreover, section 1232(a)(5)(D)(ii) also requires an Immigration Judge to determine UAC status as a prerequisite to granting voluntary departure at the conclusion of removal proceedings. That statute provides that a UAC does not need to post bond or prove that he or she has the financial means to depart the United States in order to qualify for voluntary departure after the completion of removal proceedings. All other respondents are required to post bond or prove financial means to depart as a prerequisite to being granted voluntary departure. *See* INA § 240B(b); 8 U.S.C. § 1229c(b). Because only an Immigration Judge has authority to grant voluntary departure under INA § 240B(b), this suggests that Immigration Judges have independent authority to determine whether a respondent qualifies as a UAC for purposes of waiving the “financial means” requirement imposed by statute.

The TVPRA does explicitly limit an Immigration Judge’s jurisdiction during removal proceedings in one instance: Section 208(b)(3)(C) of the Act, provides that:

An asylum officer (as defined in section 235(b)(1)(E)) shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child (as defined in section 462(g) of the Homeland Security Act) . . .

8 U.S.C. § 1158(b)(3)(C).

Congress enacted this provision as an exception to the rule that once removal proceedings commence an Immigration Judge has exclusive jurisdiction over a respondent’s asylum application, if any. *See* 8 C.F.R. §§ 1003.14(b), 1208.2(b). Nothing in the language of this statute limits an Immigration Judge’s authority to make a determination of UAC status as a prerequisite to determining the threshold jurisdictional question: whether he or she has jurisdiction over a respondent’s asylum application. Rather, it is a familiar rule that a federal court always has jurisdiction to determine its

own jurisdiction. *United States v. Ruiz*, 536 U.S. 622, 628 (2002). The Immigration Courts are no different. An Immigration Judge “has the authority to consider and decide whether he has jurisdiction over a matter presented to him. In other words, an Immigration Judge has jurisdiction to determine his jurisdiction.” *Matter of Bulnes-Nolasco*, 25 I&N Dec. 57, 59 (BIA 2009). Accordingly, we believe that an Immigration Judge has authority to make an independent determination as to whether a respondent is or is not a UAC for purposes of determining whether he or she has initial jurisdiction over the respondent’s asylum application.³

For the forgoing reasons, we conclude that Immigration Judges may resolve any dispute about UAC status during the course of removal proceedings when such a determination is required to decide a respondent’s eligibility for relief, or as part of a determination regarding whether the Immigration Judge has jurisdiction over a respondent’s asylum application, *see* INA § 208(b)(3)(C).

IV.

You also asked whether an alien who had UAC status at either the time of apprehension or placement in removal proceedings loses the protections of the TVPRA if the alien’s status changes.

Again, the starting point is the language of the statute itself, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and the specific context in which that language is used. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). As discussed above, the TVPRA’s protections apply starting from the initial moment of the child’s encounter with the DHS, which requires prompt transfer to ORR custody and placement in removal proceedings under section 240 of the Act. However, there is nothing in the TVPRA like the statutory provisions under the Child Status Protection Act to lock in an individual’s UAC status for all time. *Compare* INA §§ 201(f), 203(h)(1)(A), 8 U.S.C. §§ 1151(f), 1153(h)(1)(A) with 8 U.S.C. § 1232(g). Rather, the plain language of the statute suggests that a UAC’s status could change either (1) because the individual is no longer under 18 and has aged out of the definition of a UAC; (2) because the individual is no longer unaccompanied, after a parent has been

³ As a legal matter, DHS’s determination of UAC status is not binding on an Immigration Judge. Rather, an Immigration Judge has independent legal authority to decide whether he or she has jurisdiction over an asylum application and may decide the corresponding question of UAC status. Nevertheless, we note that the agency has advised Immigration Judges that, as a matter of policy, they need not *sua sponte* re-determine a respondent’s UAC status in cases where ICE does not object to a continuance or administrative closure to allow a respondent to pursue an asylum application with USCIS. This advice was in line with a guidance document issued by the Office of the Chief Immigration Judge advising Immigration Judges “to exercise discretion . . . to ensure coordination among government agencies responsible for the implementation of the asylum jurisdictional provision of the TVPRA.” *See* EOIR, Office of the Chief Immigration Judge, Implementation of the Trafficking Victim’s Protection Reauthorization Act of 2008 Asylum Jurisdictional Provision (Interim Guidance) (March 20, 2009).

located to provide care and custody; or (3) because the individual has been granted legal status during the pendency of the removal proceedings. See 8 U.S.C. § 1232(g). This indicates that Congress did not intend for all of the TVPRA's protections to apply permanently to any alien who was designated as a UAC at the time of apprehension or placement in removal proceedings. As discussed above, there are three provisions in the TVPRA that implicate EOIR's jurisdiction and an Immigration Judge's authority to waive certain statutory requirements governing applications for relief from removal.

First, INA § 208(b)(3)(C), 8 U.S.C. § 1158(b)(3)(C), provides that "an asylum officer shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child." Although the statute appears in a section of the TVPRA entitled "Permanent Protections for Certain At-Risk Children," the language of the statute strongly suggests that it creates two requirements: the filing of an asylum application and UAC status on the date of filing. Two circuit courts have issued decisions (one unpublished) adopting this interpretation through petitions for review filed from Board decisions affirming an Immigration Judge's authority to exercise initial jurisdiction over an asylum application filed by a former unaccompanied child.⁴ See *Harmon v. Holder*, 758 F.3d 728 (6th Cir. 2014) (finding that although the alien was a UAC when the alien entered the United States, the alien was older than 18 at the time of filing the asylum application and was not entitled to USCIS initial jurisdiction); *Muzariegos-Diaz v. Lynch*, 605 F. App'x 675, 676 (9th Cir. 2015). Therefore, the most natural reading of the statute is only a respondent who was a UAC *at the time of filing* the asylum application (either in Immigration Court or before USCIS) is eligible to apply for asylum with USCIS in the first instance.

Second, under 8 U.S.C. § 1232(a)(5)(D)(ii), a UAC, if otherwise eligible for voluntary departure, is not required to post a voluntary departure bond or to bear other costs attributable to the granting of such relief. Specifically, the statute provides that "[a]ny unaccompanied alien child sought to be removed by the Department of Homeland Security . . . shall be placed in removal proceedings [and] . . . eligible for relief under section 240B of the Act (8 U.S.C. § 1229a) at no cost to the child." We acknowledge that there is some ambiguity in the statute. The statute could be read to apply to any respondent designated as a UAC when DHS "seeks to remove" the child (that is, at the time the child is placed in removal proceedings) or only to a respondent who continues to be a UAC at the time he or she applies for voluntary departure. OGC's view is that the language "sought to be removed" merely imposes a duty on DHS to place such individuals in removal proceedings but does not permanently waive the departure bond/financial means requirement for any individual initially designated as a UAC by DHS. Rather, the language "at no cost to the child" is better read as alleviating a UAC of the burden

⁴ We note that these cases demonstrate that EOIR has exercised authority to determine UAC status for the purposes of applying INA § 208(b)(3)(C), which further supports our determination that Immigration Judges have independent authority to make UAC determinations.

to prove that he or she has the means to depart while he or she *remains an unaccompanied alien child*. Accordingly, we think that the most natural reading of the statute permits Immigration Judges to determine UAC status at the time that a respondent applies for voluntary departure and as a prerequisite to waiving the financial means/departure bond requirement that applies to all other respondents.

Third, INA § 208(a)(2)(E), 8 U.S.C. § 1158(a)(2)(E),⁵ waives the requirement that UAC must apply for asylum within one year of arrival to the United States. Specifically, INA § 208(a)(1), 8 U.S.C. § 1158(a)(1), provides that any alien who is physically present in the United States may file for asylum. Subparagraph (B), however, specifies that the right to asylum “shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien’s arrival in the United States.” INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B). The TVPRA modified this exception, adding that subparagraph “(B) shall not apply to an unaccompanied alien child.” INA § 208(a)(2)(E), 8 U.S.C. § 1158(a)(2)(E). As discussed above, the plain language of the statute does not support a permanent UAC designation based on an alien’s status at the time of entry or apprehension. Rather, INA § 208(a)(2)(E) only applies to respondents who meet the definition of UAC, which is not a permanent status. There is, however, some ambiguity over when the one-year deadline begins to run. Specifically, the statute can be interpreted as relieving a respondent from complying with the one-year time limit while he or she is a UAC, but the clock continues running. Alternatively it can be read as tolling the one-year filing deadline during the time a respondent is a UAC such that the one year clock begins when the respondent loses UAC status. OGC believes that the best interpretation is that the one-year deadline is tolled while a respondent is in UAC status and begins running when a respondent loses such status.⁶

⁵ As discussed above, this provision also waives the “safe third country limitation” on applying for asylum for UAC. For practical purposes, however, the safe third country limitation has very limited applicability because the only safe third country agreement currently in effect is an agreement between the United States and Canada and it only applies in certain limited circumstances. See EOIR, Office of the Chief Immigration Judge, OPM 04-09, *U.S. - Canada Agreement Regarding Cooperation in the Examination of Refugee Status Claims - “Safe Third Country”* (Dec. 28, 2004). This makes an in-depth discussion of this provision unnecessary at this time.

⁶ We also note that that an asylum application may be considered after the 1-year filing deadline if the applicant can establish “extraordinary circumstances.” INA § 208(a)(2)(D). One such extraordinary circumstance is if the alien is under a legal disability during the 1-year period after arrival (e.g., the alien was an unaccompanied minor) as long as the alien filed the application within a reasonable period given those circumstances. 8 C.F.R. § 1208.4(a)(5)(ii). The Act and regulations do not define “minor” and the Board has not issued a precedential decision addressing this issue. Accordingly, an Immigration Judge or the Board may construe the term minor more broadly than the definition of UAC for purposes of excusing the one-year filing deadline.

Finally, we are aware that the TVPRA was enacted as an important step to “protecting unaccompanied alien children [who had] been forced to struggle through an immigration system designed for adults.” Cong. Rec. S10886-01 (daily ed. Dec. 10, 2008) (statement of Sen. Feinstein, cosponsor of original Senate version). For the reasons discussed above, however, and in light of the language of the statute, we do not believe that Congress intended to provide permanent protections to all respondents based on their status at entry. Rather, our interpretation is consistent with the purpose of the TVPRA, which is to provide protections and rights to individuals who remain unaccompanied, under the age of eighteen, and without legal status during removal proceedings.

V.

For the above stated reasons, we conclude that Immigration Judges are not bound by DHS’s determination regarding whether a respondent is or is not a UAC. Instead, Immigration Judges may resolve any dispute about UAC status during the course of removal proceedings when such a determination bears on a respondent’s eligibility for relief, or as part of a determination regarding the applicability of the initial jurisdiction provision set forth in section 208(b)(3)(C) of the Act. We also conclude that under the plain language of the statute, an alien may lose certain protections of the TVPRA if the alien’s status changes. The implications that result from a UAC’s status change will depend on the specific statute at issue being applied by the Immigration Judge.

Noferi, Mark (EOIR)

From: (b) (6)
Sent: Monday, October 2, 2017 6:40 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] CA9 affirms Hernandez v. Sessions class action injunction!

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From: Dan Kowalski <dkowalski@david-ware.com>
Date: Mon, Oct 2, 2017 at 2:45 PM
Subject: [immprof] CA9 affirms Hernandez v. Sessions class action injunction!
To: immprof@lists.ucla.edu <immprof@lists.ucla.edu>

<https://www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/archive/2017/10/02/ca9-affirms-hernandez-v-sessions-class-action-injunction-unreasonable-immigration-bonds.aspx>

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Sent: Monday, October 2, 2017 6:40 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] Dimaya OA transcript is up

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Date: Mon, Oct 2, 2017 at 5:37 PM
Subject: [immprof] Dimaya OA transcript is up
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https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/15-1498_886b.pdf

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From: (b) (6)
Sent: Thursday, October 19, 2017 2:23 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: EOIR seeking law student interns
Attachments: Internship EOIR OGC - summer 2018.pdf

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From: (b) (6)
Date: Thu, Oct 19, 2017 at 2:22 PM
Subject: EOIR seeking law student interns
To: immprof@lists.ucla.edu <immprof@lists.ucla.edu>

Hi all,

EOIR is seeking law student interns for next summer. Interns would gain experience in litigation, regulations, and policy, as well as fraud and abuse investigations (including notario fraud), and attorney discipline. Applications are due Friday, January 19, 2018.

Please forward widely to interested students. Please feel free to contact me as well, at mark.noferi@usdoj.gov, or Alex Hartman, at Alexander.Hartman@usdoj.gov.

Best,

Mark

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(b) (6)

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(b) (6)

Noferi, Mark (EOIR)

From: (b) (6)
Sent: Monday, October 23, 2017 3:26 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: Mark Noferi has shared a file with you using Dropbox

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From: (b) (6)
Date: Mon, Oct 23, 2017 at 3:24 PM
Subject: Mark Noferi has shared a file with you using Dropbox
To: (b) (6)

Hi,

Here's a link to "Noferi, Concentric Coordination, ABA ARLN Winter 2017.pdf" in my Dropbox:

<https://www.dropbox.com/s/q547vwhbsxb6q2i/Noferi%2C%20Concentric%20Coordination%2C%20ABA%20ARLN%20Winter%202017.pdf?dl=0>

Sent from my iPhone

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(b) (6)

Noferi, Mark (EOIR)

From: (b) (6)
Sent: Monday, October 23, 2017 3:58 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: Boston College Law School - Job Posting Approved (Summer Intern - The Office of General Counsel)

----- Forwarded message -----

From: SAGE <notifications@law-bc.12twenty.com>
Date: Mon, Oct 23, 2017 at 1:15 PM
Subject: Boston College Law School - Job Posting Approved (Summer Intern - The Office of General Counsel)
To: (b) (6)

Dear (b) (6)

The following job has been approved and posted to SAGE.

- Title: Summer Intern - The Office of General Counsel
- Application deadline: 01/19/2018

Sincerely,
The CSO Team
617-552-4345 | law.career@bc.edu

This message was sent by



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Database**

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From: (b) (6)
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To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] new TRIG memo
Attachments: image001.png

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From: Dan Kowalski <dkowalski@david-ware.com>
Date: Tue, Oct 31, 2017 at 5:59 PM
Subject: [immprof] new TRIG memo
To: immprof@lists.ucla.edu <immprof@lists.ucla.edu>

<https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-1019-Rescission-of-TRIG-Hold-Policy-PM-602-0150.pdf>

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Managing Partner, Colorado



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Metairie, Louisiana 70002-1752

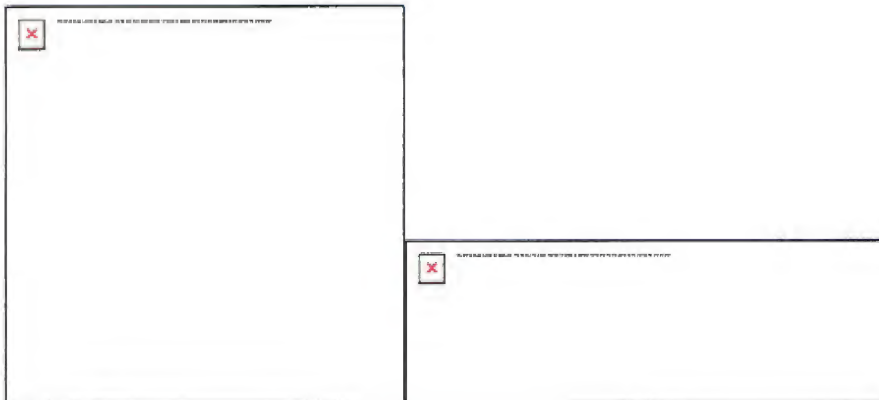
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INVEST



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From: (b) (6)
Sent: Thursday, November 9, 2017 7:13 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: Afternoon Buzz: Goodlatte of Virginia retiring from Congress after 13 terms

----- Forwarded message -----

From: The Washington Post <email@washingtonpost.com>
Date: Thu, Nov 9, 2017 at 4:07 PM
Subject: Afternoon Buzz: Goodlatte of Virginia retiring from Congress after 13 terms
To: (b) (6)

The Washington Post
Afternoon Buzz

Updates since this morning's paper



Goodlatte of Virginia retiring from Congress after 13 terms

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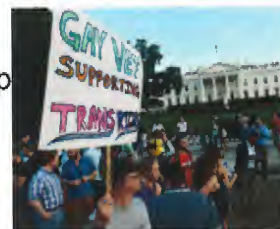
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Going Out Guide staff • [Read more »](#)



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Ovetta Wiggins • [Read more »](#)



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Noferi, Mark (EOIR)

From: (b) (6)
Sent: Monday, December 4, 2017 4:36 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] advance copy of EOIR final rule on suspension/cancellation

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From: Dan Kowalski <dkowalski@david-ware.com>
Date: Mon, Dec 4, 2017 at 1:34 PM
Subject: [immprof] advance copy of EOIR final rule on suspension/cancellation
To: immprof@lists.ucla.edu <immprof@lists.ucla.edu>

<https://s3.amazonaws.com/public-inspection.federalregister.gov/2017-26104.pdf>

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From: (b) (6)
Sent: Wednesday, December 6, 2017 5:23 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] Sessions on EOIR adjudications

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Date: Wed, Dec 6, 2017 at 4:28 PM
Subject: [immprof] Sessions on EOIR adjudications
To: immprof@lists.ucla.edu <immprof@lists.ucla.edu>

<https://www.justice.gov/opa/press-release/file/1015996/download>

<https://www.justice.gov/opa/press-release/file/1016066/download>

<https://www.justice.gov/opa/pr/attorney-general-sessions-issues-memo-outlining-principles-ensure-adjudication-immigration>

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From: (b) (6)
Sent: Thursday, December 14, 2017 6:22 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] TPS for Honduras Extended, Terminated for Nicaragua

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From: Dan Kowalski <dkowalski@david-ware.com>
Date: Thu, Dec 14, 2017 at 3:14 PM
Subject: [immprof] TPS for Honduras Extended, Terminated for Nicaragua
To: immprof@lists.ucla.edu <immprof@lists.ucla.edu>

<https://www.lexisnexis.com/legalnewsroom/immigration/b/immigration-law-blog/archive/2017/12/14/tps-for-honduras-extended-terminated-for-nicaragua.aspx>

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Noferi, Mark (EOIR)

From: (b) (6)
Sent: Friday, December 15, 2017 7:22 AM
To: Noferi, Mark (EOIR)
Subject: Immigration Enforcement and Sensitive Locations: Where Can ICE Make Arrests?

[Immigration Enforcement and Sensitive Locations: Where Can ICE Make Arrests?](#)
// [Bipartisan Beat Blog](#)

Under the Trump administration, there has been a notable increase in immigration enforcement actions by U.S. immigration and Customs Enforcement (ICE). With this increased activity has come increased scrutiny. Reports calling attention to the types of locations, such as courthouses and hospitals, where arrests are being made, has led to a debate about where ICE should and should not exercise its...

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From: (b) (6)
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To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] CA11, Stevens v. Sessions

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From: Dan Kowalski <dkowalski@david-ware.com>
Date: Mon, Dec 18, 2017 at 10:39 PM
Subject: [immprof] CA11, Stevens v. Sessions
To: immprof@lists.ucla.edu <immprof@lists.ucla.edu>

<http://media.ca11.uscourts.gov/opinions/pub/files/201612007.pdf>

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Noferi, Mark (EOIR)

From:

(b) (6)

Sent:

Saturday, December 23, 2017 11:17 PM

To:

Noferi, Mark (EOIR)

Subject:

Fwd: [immprof] COMPLAINT AGAINST CHIEF IMMIGRATION JUDGE FOR ORDERING JUDGES TO IGNORE FEDERAL LAWS PROTECTING CHILDREN | Amoachi & Johnson, Attorneys at Law, PLLC

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From: Dan Kowalski <dkowalski@david-ware.com>

Date: Sat, Dec 23, 2017 at 10:29 AM

Subject: [immprof] COMPLAINT AGAINST CHIEF IMMIGRATION JUDGE FOR ORDERING JUDGES TO IGNORE FEDERAL LAWS PROTECTING CHILDREN | Amoachi & Johnson, Attorneys at Law, PLLC

To: immprof@lists.ucla.edu <immprof@lists.ucla.edu>

<https://amjolaw.com/2017/12/22/complaint-against-chief-immigration-judge-for-ordering-judges-to-ignore-federal-laws-protecting-children/>

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Noferi, Mark (EOIR)

From: (b) (6)
Sent: Saturday, December 30, 2017 10:06 AM
To: Noferi, Mark (EOIR)
Subject: The Washington Post: Sen. Thom Tillis on why he expects his staffers to apply for other jobs

I thought you might like this story from The Washington Post.

Sen. Thom Tillis on why he expects his staffers to apply for other jobs Also, his big idea for helping people get past politics to actually work together

<https://www.washingtonpost.com/news/on-leadership/wp/2017/12/28/sen-thom-tillis-on-why-he-expects-his-staffers-to-apply-for-other-jobs/>

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Noferi, Mark (EOIR)

From: (b) (6)
Sent: Sunday, December 31, 2017 6:00 PM
To: Noferi, Mark (EOIR)
Subject: PrawfsBlawg: Can Trump use Auer deference to undo Obama's rules?

<http://prawfsblawg.blogs.com/prawfsblawg/2017/12/can-trump-use-auer-deference-to-undo-obamas-rules.html>

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Noferi, Mark (EOIR)

From: (b) (6)
Sent: Friday, January 5, 2018 6:43 AM
To: Noferi, Mark (EOIR)
Subject: NYTimes: How to Work From Home

<https://www.nytimes.com/2017/09/19/smarter-living/work-at-home-tips-advice.html?smprod=nytcore-ipad&smid=nytcore-ipad-share>

Working remotely has become an increasingly easy and breathlessly viable option for many employees.

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From: (b) (6)
Sent: Wednesday, January 17, 2018 12:53 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] OPPM 18-01 re change of venue

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From: Dan Kowalski <dkowalski@david-ware.com>
Date: Wed, Jan 17, 2018 at 12:10 PM
Subject: [immprof] OPPM 18-01 re change of venue
To: immprof@lists.ucla.edu <immprof@lists.ucla.edu>

<https://www.justice.gov/eoir/page/file/1026726/download>

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Editor-in-Chief

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From: (b) (6)
Sent: Thursday, January 18, 2018 6:19 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] McHenry memo
Attachments: Case Priorities and Immigration Court Performance Measures.01.17.18.pdf

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From: Dan Kowalski <dkowalski@david-ware.com>
Date: Thu, Jan 18, 2018 at 11:55 AM
Subject: [immprof] McHenry memo
To: immprof@lists.ucla.edu <immprof@lists.ucla.edu>

Daniel M. Kowalski

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Noferi, Mark (EOIR)

From: (b) (6)
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To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] C.J.L.G. V. SESSIONS, CA9

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From: Dan Kowalski <dkowalski@david-ware.com>
Date: Mon, Jan 29, 2018 at 2:33 PM
Subject: [immprof] C.J.L.G. V. SESSIONS, CA9
To: Immigration Law Professors List <immprof@lists.ucla.edu>

<http://cdn.ca9.uscourts.gov/datastore/opinions/2018/01/29/16-73801.pdf>

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Noferi, Mark (EOIR)

From: (b) (6)
Sent: Tuesday, March 6, 2018 10:08 AM
To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] SESSIONS "GOES DEEP" TO UNDERMINE DUE PROCESS! — Matter of E-F-H-L-, 27 I&N Dec. 226 (A.G. 2018)! – immigrationcourtside.com

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From: Dan Kowalski <dkowalski@david-ware.com>
Date: Tue, Mar 6, 2018 at 9:15 AM
Subject: [immprof] SESSIONS "GOES DEEP" TO UNDERMINE DUE PROCESS! — Matter of E-F-H-L-, 27 I&N Dec. 226 (A.G. 2018)! – immigrationcourtside.com
To: immprof@lists.ucla.edu <immprof@lists.ucla.edu>

<http://immigrationcourtside.com/2018/03/06/sessions-goes-deep-to-undermine-due-process-matter-of-e-f-h-l-27-in-dec-226-a-g-2018/>

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To: Noferi, Mark (EOIR)
Subject: The Washington Post: U.S. Immigration agency to more closely monitor caseworkers, documents show

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U.S. Immigration agency to more closely monitor caseworkers, documents show Oversight division aims to root out employee misconduct and ensure integrity, amid wider Trump administration crackdown.

https://www.washingtonpost.com/world/national-security/us-immigration-agency-to-more-closely-monitor-caseworkers-documents-show/2018/03/15/c8289c0c-2881-11e8-874b-d517e912f125_story.html

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From: (b) (6)
Sent: Monday, March 19, 2018 1:21 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] SC to hear 236(c) mandatory detention "when...released" case: Nielsen v. Preap

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From: Dan Kowalski <dkowalski@david-ware.com>
Date: Mon, Mar 19, 2018 at 11:53 AM
Subject: [immprof] SC to hear 236(c) mandatory detention "when...released" case: Nielsen v. Preap
To: immprof@lists.ucla.edu <immprof@lists.ucla.edu>

<https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/16-1363.html>

<http://www.scotusblog.com/case-files/cases/nielsen-v-preap/>

<http://www.scotusblog.com/wp-content/uploads/2017/06/16-1363-opinion-below.pdf>

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From: (b) (6)
Sent: Monday, March 19, 2018 9:03 PM
To: Noferi, Mark (EOIR)
Subject: NoVa housing fair

https://www.washingtonpost.com/news/where-we-live/wp/2018/03/15/free-housing-fair-in-northern-virginia-to-offer-tips-for-renters-and-first-time-buyers/?utm_term=.aec7294a10a0

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Noferi, Mark (EOIR)

From: (b) (6)
Sent: Friday, May 4, 2018 10:48 AM
To: Noferi, Mark (EOIR)
Subject: Fwd: Prosecuting Migrants for Coming to the United States

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From: (b) (6) American Immigration Council (b) (6)
Date: Tuesday, May 1, 2018
Subject: Prosecuting Migrants for Coming to the United States
To: (b) (6)



Mark,

Over the last two decades, the federal government increasingly has criminally punished people for immigration violations. Along the Southwest border particularly, federal officials are vigorously prosecuting migrants for entering the United States without permission.

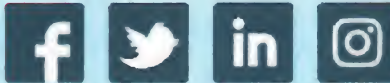
The American Immigration Council believes in policy debates driven by the facts. So, today, we are issuing the fact sheet, [Prosecuting Migrants for Coming to the United States](#), which provides basic information about these prosecutions, the increasing criminalization of immigration, and the heavy costs on migrants and the American taxpayer, alike.

[Download the Fact Sheet](#)

Sincerely,

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To: Noferi, Mark (EOIR)
Subject: Why Office Friendships Can Feel So Awkward - The New York Times

Why Office Friendships Can Feel So Awkward - The New York Times

<https://nyti.ms/2LCtzVz>

Noferi, Mark (EOIR)

From: (b) (6)
Sent: Thursday, July 5, 2018 9:51 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] 2 new USCIS Policy Memos

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Date: Thu, Jul 5, 2018 at 6:13 PM
Subject: [immprof] 2 new USCIS Policy Memos
To: Immigration Law Professors List <immprof@lists.ucla.edu>

<https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>

<https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0161-DACA-Notice-to-Appear.pdf>

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Noferi, Mark (EOIR)

From: (b) (6)
Sent: Friday, July 6, 2018 9:17 AM
To: Noferi, Mark (EOIR)
Subject: For Resiliency committee

http://www.abajournal.com/magazine/article/lawyer_loneliness_public_health

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Noferi, Mark (EOIR)

From:

(b) (6)

Sent:

Thursday, July 12, 2018 7:45 AM

To:

Noferi, Mark (EOIR)

Subject:

JOMO

<https://www.nytimes.com/2018/07/12/style/joy-of-missing-out-summer.html>

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Noferi, Mark (EOIR)

From: (b) (6)
Sent: Thursday, July 12, 2018 7:55 AM
To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] Matter of A-B- Policy Guidance
Attachments: ATT00001.htm; 2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf

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Date: Thu, Jul 12, 2018 at 12:15 AM
Subject: [immprof] Matter of A-B- Policy Guidance
To: immprof@lists.ucla.edu <immprof@lists.ucla.edu>

<https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf>

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U.S. Citizenship
and Immigration
Services

July 11, 2018

PM-602-0162

Policy Memorandum

SUBJECT: Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*

Purpose

This policy memorandum (PM) provides guidance to U.S. Citizenship and Immigration Services (USCIS) officers for determining whether a petitioner is eligible for asylum or refugee status in light of the Attorney General's decision in *Matter of A-B-*. The guidance in this memorandum supersedes all previous guidance dealing specifically with asylum and refugee eligibility that is inconsistent with this guidance.

Scope

This PM applies to and shall be used to guide determinations by all USCIS employees. USCIS personnel are directed to ensure consistent application of the reasoning in *Matter of A-B-* in reasonable fear, credible fear, asylum, and refugee adjudications.

Authority

Sections 101(a)(42), 207, 208, and 235 of the Immigration and Nationality Act (INA) (8 U.S.C. §§ 1101(a)(42), 1157, 1158, 1225); Section 451 of the Homeland Security Act of 2002 (6 U.S.C. § 271); Title 8 Code of Federal Regulations (8 C.F.R.) Parts 207, 208, and 235.

I. Background

On June 11, 2018, the Attorney General published *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), which addresses how to adjudicate protection claims based on "membership in a particular social group" and clarifies the substantive elements of eligibility. The purpose of this memorandum is to provide guidance to asylum and refugee officers on the application of this decision while processing reasonable fear, credible fear, asylum, and refugee claims.¹

In the decision, the Attorney General overruled the Board of Immigration Appeals' (BIA) precedent decision in *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), on which the BIA had relied in finding

¹ Although the alien in *Matter of A-B-* claimed asylum and withholding of removal, the Attorney General's decision and this PM apply also to refugee status adjudications and reasonable fear and credible fear determinations. See INA §§ 207(c)(1), 208(b)(1), 101(a)(42)(A), 235(b)(1); 8 C.F.R. § 208.31.

A-B- eligible for asylum. The Attorney General found that, in analyzing the particular social group at issue in *A-R-C-G-*, “married women in Guatemala who are unable to leave their relationship,” the BIA failed to correctly apply the legal standards for a cognizable particular social group set forth in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), and *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), *aff’d in relevant part and vacated in part on other grounds in Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016); *cert. denied*, 138 S. Ct. 736 (2018), which require that a group be composed of members who share a common immutable characteristic, be defined with particularity, and be socially distinct within the society in question.

In addition, the Attorney General stressed the requirement that membership in the particular social group must be a central reason for the persecution, and that officers must consider, where applicable and consistent with the regulations, whether internal relocation is reasonably available to avoid future persecution before granting asylum. *See Matter of A-B-*, 27 I&N Dec. at 337-39, 343-45. In cases where the persecutor is a non-government actor, the applicant must show the harm or suffering was inflicted by persons or an organization that his or her home government is unwilling or unable to control, such that the government either “condoned the behavior or demonstrated a complete helplessness to protect the victim.” *Id.* at 337 (quotation marks omitted).

Section 103(a) of the INA provides that “determination and ruling by the Attorney General with respect to all questions of law shall be controlling.” Further, under 8 C.F.R. §§ 103.10(b) and 1003.1(g), “decisions of the [BIA], and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security” and “shall serve as precedents in all proceedings involving the same issue or issues.” Accordingly, the decision in *Matter of A-B-* was effective immediately and is binding on all USCIS officers. Officers should not cite or rely upon *Matter of A-R-C-G-* in any adjudications going forward. Officers should continue to follow other binding precedents to the extent they are consistent with *Matter of A-B-*, including *Matter of M-E-V-G-* and *Matter of W-G-R-*, both of which were cited favorably in the Attorney General’s decision.

II. USCIS Officers’ General Duties

To be eligible for asylum or refugee status, the alien must establish in part that he or she was persecuted or has a well-founded fear of persecution on account of one of the protected grounds, is unable or unwilling to avail himself or herself of the protection of his or her country of nationality (or, if stateless, country of last habitual residence), and does not fall within one of the grounds for ineligibility. Second, if eligibility is established, the USCIS officer must then consider whether or not to exercise discretion to grant the application.

In *Matter of A-B-*, the Attorney General reaffirmed the duty to determine whether the facts of each case satisfy all the elements for asylum. *Matter of A-B-*, 27 I&N Dec. at 340 (“The respondent must present facts that undergird each of these elements, and the asylum officer, immigration judge, or the Board has the duty to determine whether those facts satisfy all of the legal requirements for asylum.”). The officer must determine the applicant’s credibility in making findings of fact. *Id.* at 341–42. If an asylum application is fatally flawed on one essential ground—“for example, for failure to show membership in a proposed social group”—then a USCIS officer need not examine the remaining elements for asylum. *Id.* at 340.

III. Proving Persecution or a Well-Founded Fear of Persecution Based on Membership in a Particular Social Group

As an initial matter, an applicant seeking asylum or refugee status based on membership in a particular social group must present facts that clearly identify the proposed particular social group. *Matter of A-B-*, 27 I&N Dec. at 344 (“an applicant seeking asylum or withholding of removal based on membership in a particular social group must clearly indicate, on the record and before the immigration judge, the exact delineation of any proposed particular social group.”).

For claims based on membership in a particular social group, an applicant has the burden to prove: (1) membership in a particular group, which is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question; (2) that her membership in that group is a central reason for her persecution; and (3) that the alleged harm is inflicted by the government of her home country or by persons that the government is unwilling or unable to control. INA § 208(b)(1)(B)(i); *Matter of A-B-*, 27 I&N Dec. at 320.

A. Legal Framework for Analysis of Particular Social Group Claims

i. Immutability

The members of a proposed social group must have “a common immutable characteristic.” *Matter of A-B-*, 27 I&N Dec. at 320; *see also Matter of M-E-V-G-*, 26 I&N Dec. at 237-38 (“Our interpretation of the phrase ‘membership in a particular social group’ incorporates the common immutable characteristic standard set forth in *Matter of Acosta*, 19 I&N Dec. [211,] 233 [(BIA 1985)], because members of a particular social group would suffer significant harm if asked to give up their group affiliation, either because it would be virtually impossible to do so or because the basis of affiliation is fundamental to the members’ identities or consciences.”).

ii. Particularity

The Attorney General reaffirmed that the particular social group also must be defined with particularity. *Matter of A-B-*, 27 I&N Dec. at 320, 335-36. A group is particular if the “group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.” *Id.* at 330 (citing *Matter of E-A-G-*, 24 I&N Dec. 591, 594 (BIA 2008)). A particular social group must not be “amorphous, overbroad, diffuse, or subjective,” and “not every ‘immutable characteristic’ is sufficiently precise to define a particular social group.” *Id.* at 335 (citing *Matter of M-E-V-G-*, 26 I&N Dec. at 239). For example, the combined terms “married,” “women,” and “unable to leave the relationship” are unlikely to be sufficiently particular even though the terms “married” and “women” may independently have commonly understood definitions within the relevant society. *See Matter of A-B-*, 27 I&N Dec. at 335. Officers must analyze each case on its own merits in the context of the society where the claim arises. An officer’s analysis of a proposed social group is incomplete whenever the defining terms of the proposed group are analyzed in isolation, rather than collectively. *See id.*

Similarly, the Attorney General addressed proposed groups defined by their vulnerability to crime. A “particular” social group is a specific segment of the population. *See id.* at 322. Persecution on account of a protected ground can occur within the context of generalized violence. *See, e.g., Konan v. Att’y Gen. of the U.S.*, 432 F.3d 497, 503-06 (3d Cir. 2005); *Vente v. Gonzales*, 415 F.3d 296, 301-02 (3d Cir. 2005); *Matter of Villalta*, 20 I&N Dec. 142 (BIA 1990). However, in societies where virtually *everyone* is at risk of crime—or broad swaths of society are at risk of crime—groups defined by vulnerability to crime are not a subdivision of the society, but instead are typical of the society as a whole. *See Matter of A-B-*, 27 I&N Dec. at 335. “[G]roups comprising persons who are ‘resistant to gang violence’ and susceptible to violence from gang members on that basis ‘are too diffuse to be recognized as a particular social group.’ . . . Victims of gang violence often come from all segments of society, and they possess no distinguishing characteristic or concrete trait that would readily identify them as members of such a group.” *Id.* at 335. Thus, “[s]ocial groups defined by their vulnerability to private criminal activity likely lack the particularity required . . . given that broad swaths of society may be susceptible to victimization.” *Id.*

iii. Social Distinction

The Attorney General also reaffirmed that to satisfy the social distinction requirement, a particular social group “must be perceived as a group by society.” *Id.* at 330. “[I]f the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it.” *Id.* (citing *Matter of M-E-V-G-*, 26 I&N Dec. at 238). In other words, “[m]embers of a particular social group will generally understand their own affiliation with that group, as will other people in their country.” *Id.*

The Attorney General offered examples of how these last two requirements of a particular social group—particularity and social distinction—work together. If a group is defined too narrowly, such as “Guatemalan women who are unable to leave their domestic relationships where they have children in common,” then the group will likely not be socially distinct. *Id.* at 336. But if the proposed group is too broad, such as persons who are “resistant to gang violence” and susceptible to violence from gang members on that basis, then the group will likely not have definable boundaries and thus not be particular. *Id.* at 335. This is why the evidence presented must precisely demonstrate the particular social group claimed.²

In contrast, a tribe or a clan often constitutes a particular social group, because they have highly recognizable, immutable characteristics that have discrete boundaries. *Id.* at 336. As with all proposed particular social groups, officers should carefully apply the statutory factors to determine whether the group qualifies under the law.

² Asylum officers are reminded that interviews are to be conducted in a nonadversarial manner with the purpose to elicit all relevant and useful information bearing on the applicant’s eligibility for asylum. *See* 8 C.F.R. § 208.9(b).

iv. Defined Independently of the Persecution at Issue

The Attorney General reaffirmed in *Matter of A-B-* that, to be cognizable, a particular social group “must exist independently of the harm asserted.” 27 I&N Dec. at 334; *see also id.* at 335 (“The individuals in the group must share a narrowing characteristic other than their risk of being persecuted” (quoting *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005))). This requirement is essential because otherwise, “the definition of the group moots the need to establish actual persecution.” *Id.*

The proposed group in *Matter of A-B-* was “married women in Guatemala who are unable to leave their relationship.” *Id.* at 336. The Attorney General observed that this formulation “was effectively defined to consist of women in Guatemala who are victims of domestic abuse because the inability ‘to leave’ was created by [the] harm or threatened harm.” *Id.* at 335. Such a formulation would generally not share a “narrowing characteristic other than their risk of being persecuted.” *Id.* (quoting *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005)). Indeed, the Attorney General criticized *Matter of A-R-C-G-*, which “never considered” whether this proposed particular social group met this requirement. *Id.*

The above analysis casts doubt on whether a particular social group defined solely by the ability to leave a relationship can be sufficiently particular. Even if “unable to leave” were particular, the applicant must show something more than the danger of harm from an abuser if the applicant tried to leave, because that would amount to circularly defining the particular social group by the harm on which the asylum claim was based. Officers should carefully examine any proposed particular social group to ascertain whether it contains any attributes that “exist independently of the harm asserted.”

B. Proving Persecution, Nexus, and Internal Relocation

i. Persecution

Applicants must demonstrate past persecution or the requisite likelihood of future persecution.³ The Attorney General observed that “persecution” consists of three elements: (1) it involves “an intent to target a belief or characteristic,” (2) “the level of harm must be severe,” and (3) “the harm or suffering must be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control.” *Matter of A-B-*, 27 I&N Dec. at 337 (quotation marks omitted); *see also id.* (observing that “private criminals are more often motivated by greed or vendettas than by an intent to ‘overcome the protected characteristic of the victim’” (quoting *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996) (alterations omitted))).

³ Persecution is defined as “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.” *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *modified on other grounds*, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). As used in section 101(a)(42)(A) of the INA, the word “persecution” “clearly contemplates that harm or suffering must be inflicted upon an individual . . . for possessing a belief or characteristic a persecutor seeks to overcome.” *Id.* at 223, *as modified by Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996); *see Matter of A-B-*, 27 I&N Dec. at 337 (citing *Matter of Kasinga*). It “does not embrace harm arising out of civil strife or anarchy,” a definition specifically rejected by Congress by excluding the term “displaced persons” from the Senate’s version of the Refugee Act of 1980. *Id.*

In a case where the alleged persecutor is not affiliated with the government, the applicant must show the government is unable or unwilling to protect him or her. *Id.* at 337. When the harm is at the hands of a private actor, the applicant must show more than the government's difficulty controlling the private behavior. The applicant must show the government condoned the private actions or at least demonstrated a complete helplessness to protect the victim. *Id.* (asylum claim not established where "the respondent was able to divorce and move away from her ex-husband, [the alleged persecutor,] and that she was able to obtain from the El Salvadoran government multiple protective orders against him.").

The mere fact that a country has civil strife or anarchy resulting in displaced persons or that it has problems effectively policing certain crimes, like domestic violence or gang-related activities, or that certain populations are or are more likely to become victims of crimes or violence, cannot, by itself, establish eligibility for asylum or refugee status. *See id.* at 337-38, 343-44.

In general, in light of the above standards, claims based on membership in a putative particular social group defined by the members' vulnerability to harm of domestic violence or gang violence committed by non-government actors will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution. *Id.* at 320; *see also id.* ("While I do not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group, in practice such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address."); *id.* at 337-38 ("The fact that the local police have not acted on a particular report of an individual crime does not necessarily mean that the government is unwilling or unable to control crime, any more than it would in the United States. There may be many reasons why a particular crime is not successfully investigated and prosecuted. Applicants must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it."). *Id.*

ii. Nexus

Membership in the particular social group must also be a central reason for the persecution. Aliens may suffer threats to their lives or freedom, or experience suffering or harm for a number of reasons, including social, economic, family, or personal circumstances. But, as the Attorney General emphasized in *Matter of A-B-*, "the asylum statute does not provide redress for all misfortune." *Id.* at 318. The asylum statute was not intended as a remedy for "the numerous personal altercations that invariably characterize economic and social relationships." *Id.* at 322. As such, when a private actor inflicts violence based on a personal relationship with the victim, the victim's membership in a larger group often will not be "one central reason" for the abuse. *Id.* at 338-39. In a particular case, the evidence may establish that a victim of domestic violence was attacked based solely on her preexisting personal relationship with her abuser. Also, even if the persecutor is a member of the government, there is no governmental nexus if the dispute is a "purely personal matter." *Id.* at 339 n.10.

iii. Internal Relocation

All officers must also consider whether internal relocation in the alien's home country presents a reasonable alternative before granting asylum or refugee status. *Id.* at 345 ("Beyond the standards that victims of private violence must meet in proving refugee status in the first instance, they face the

additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible). When the applicant has suffered personal harm at the hands of only a few specific individuals, internal relocation would seem more reasonable than if the applicant were persecuted, broadly, by her country's government."). If an asylum applicant does not show past persecution, then he or she "bear[s] the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or government-sponsored." 8 C.F.R. § 208.13(b)(3)(i). If the asylum applicant does establish past persecution or if the persecutor is a government or is government-sponsored, then the officer must presume that internal relocation is unreasonable "unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate." *Id.* § 208.13(b)(3)(ii). In cases where internal relocation presents a reasonable solution, the officer should deny the applicant's claim consistent with the regulations. *Id.* § 208.13(b)(1)(i)(B), (b)(2)(ii).

C. Evaluating Credibility

An officer must also take into account an applicant's overall credibility when adjudicating a reasonable fear, credible fear, asylum, or refugee claim. There is no presumption of credibility for such claims. Rather, the applicant must demonstrate that he or she is credible. A negative credibility determination alone is sufficient to deny an asylum application and, consequently, to issue a negative credible fear or reasonable fear determination. *See* INA §§ 208(b)(1)(B)(iii), 235(b)(1)(B)(v), 241(b)(3)(C).

To determine whether an applicant or a witness is credible, the officer must consider the totality of the circumstances and all relevant factors, including the demeanor, candor, or responsiveness of the applicant; the inherent plausibility of the applicant's account; the consistency between the applicant's written and oral statements; and any inaccuracies or falsehoods in such statements. INA § 208(b)(1)(B)(iii); *see also Matter of J-Y-C*, 24 I&N Dec. at 262. Whether the inconsistencies, inaccuracies, or falsehoods go to the heart of the applicant's claim are irrelevant. INA § 208(b)(1)(B)(iii); *see also Matter of J-Y-C*, 24 I&N Dec. at 262.

IV. Exercising Discretion

Finally, the Attorney General emphasized in *Matter of A-B-* that asylum is a *discretionary* form of relief from removal. Therefore, once an officer has determined that an applicant is eligible for asylum, he or she must then decide whether to favorably exercise discretion by granting asylum. "[A] favorable exercise of discretion is a discrete requirement for the granting of asylum and should not be presumed or glossed over solely because an applicant otherwise meets the burden of proof for asylum eligibility under the INA." *Id.* at 345 n.12.

In exercising discretion, officers should consider any relevant factor, including but not limited to: "the circumvention of orderly refugee procedures; whether the alien passed through any other countries or arrived in the United States directly from her country; whether orderly refugee procedures were in fact available to help her in any country she passed through; whether he or she made any attempts to seek asylum before coming to the United States; the length of time the alien remained in a third country; and his or her living conditions, safety, and potential for long-term residency there." *Id.* (citing *Matter of Pula*, 19 I&N Dec. 467, 473–74 (BIA 1987)). Of particular note, the BIA has held that unlawful entry

“is a proper and relevant discretionary factor” and can even be a “serious adverse factor,” but “should not be considered in such a way that the practical effect is to deny relief in virtually all cases” and that “the totality of the circumstances and actions of an alien in his flight from the country where he fears persecution should be examined in determining whether a favorable exercise of discretion is warranted.” *Pula*, 19 I&N at 473. The BIA has also instructed that “[t]he danger of persecution will outweigh all but the most egregious adverse factors.” *Matter of Kasinga*, 21 I&N Dec. 357, 367 (BIA 1996).

Specifically, USCIS personnel may find an applicant’s illegal entry, including any intentional evasion of U.S. authorities, and including any conviction for illegal entry where the alien does not demonstrate good cause for the illegal entry, to weigh against a favorable exercise of discretion. In particular, “the circumvention of orderly refugee procedures” factor may take into account whether the alien entered the United States without inspection and, if not, whether the applicant had other ways to lawfully enter this country. For example, the applicant might show that the illegal entry was necessary to escape imminent harm and that he or she was thereby prevented from presenting himself or herself at a designated United States POE. An officer should consider whether the applicant demonstrated ulterior motives for the illegal entry that are inconsistent with a valid asylum claim that the applicant wished to present to U.S. authorities.

V. Credible Fear and Reasonable Fear Interviews

When aliens who are inadmissible under INA § 212(a)(6)(C) or § 212(a)(7) indicate either an intention to apply for asylum under INA § 208 or a fear of persecution or torture, an asylum officer will conduct a credible fear interview. INA § 235(b)(1)(A)(ii). Credible fear means a “significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208.” *Id.* § 235(b)(1)(B)(v).

An asylum officer will conduct a reasonable fear interview when an alien is subject to either, (1) a final administrative removal order under INA § 238(b) or (2) a prior reinstated order of removal, exclusion, or deportation under INA § 241(a)(5), and indicates a fear of persecution or torture. The “reasonable possibility” standard is the same standard required to establish eligibility for asylum (the “well-founded fear” standard). The reasonable fear standard in this context is used not as part of an eligibility determination for asylum, but rather as a screening mechanism to determine whether an individual may be able to establish entitlement in Immigration Court to INA § 241(b)(3) withholding of removal, or withholding or deferral of removal pursuant to the regulations implementing the U.S. obligations under Article 3 of the Convention against Torture.

When conducting a credible fear or reasonable fear interview, an asylum officer must determine what law applies to the applicant’s claim. The asylum officer should apply all applicable precedents of the Attorney General and the BIA, *Matter of E-L-H-*, 23 I&N Dec. 814, 819 (BIA 2005), which are binding on all immigration judges and asylum officers nationwide. The asylum officer should also apply the case law of the relevant federal circuit court, to the extent that those cases are not inconsistent with *Matter of A-B-*. See, e.g., *Matter of Fajardo Espinoza*, 26 I&N Dec. 603, 606 (BIA 2015). The relevant federal circuit court is the circuit where the removal proceedings will take place if the officer makes a

positive credible fear or reasonable fear determination. *See Matter of Gonzalez*, 16 I&N Dec. 134, 135–36 (BIA 1977); *Matter of Waldei*, 19 I&N Dec. 189 (BIA 1984).

But removal proceedings can take place in any forum selected by DHS, and not necessarily the forum where the intending asylum applicant is located during the credible fear or reasonable fear interview. Because an asylum officer cannot predict with certainty where DHS will file a Notice to Appear or Notice of Referral to Immigration Judge, and because there may not be removal proceedings if the officer concludes the alien does not have a credible fear or reasonable fear and the alien does not seek review from an immigration judge, the asylum officer should faithfully apply precedents of the Board and, if necessary, the circuit where the alien is physically located during the credible fear interview.

Matter of A-B-, as discussed above in Section III, explained the standards for “eligibility for asylum under section 208” based on a particular social group. Therefore, if an applicant claims asylum based on membership in a particular social group, then officers must factor the above standards into their determination of whether an applicant has a credible fear or reasonable fear of persecution based on membership in a particular social group. Asylum officers should bear in mind that in considering credible or reasonable fear claims, they must “consider whether the alien’s case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.” 8 C.F.R. § 208.30(a)(4).

VI. Summary

Under current precedent, including *Matter of A-B-*, *Matter of M-E-V-G-*, and *Matter of W-G-R-*, there are at least five basic inquiries that an officer must make in cases involving membership in a particular social group.

First, the officers must consider whether the facts presented or otherwise known to the officer demonstrate that the applicant is a member of a clearly-defined particular social group, which is composed of members who share a common immutable characteristic, is defined with particularity, is socially distinct within the society in question, and is not defined by the persecution on which the claim is based.

Second, the officer must require the applicant to prove that membership in the group is a central reason for the applicant’s persecution.

Third, if the alleged persecutor is not affiliated with the government, the officer must require the applicant to show that the applicant’s home government is unwilling or unable to protect him or her.

Fourth, the officer must analyze whether internal relocation in the applicant’s home country is possible, would protect the applicant from the feared persecution, and presents a reasonable alternative to a grant of asylum or refugee status.

Fifth, apart from the eligibility standards above, the officer must determine whether the applicant merits a grant of asylum or refugee status in the officer’s discretion.

Of course, the applicant must also satisfy all the other elements of the refugee definition in order to be granted asylum or refugee status. The officer must examine each element separately, even though certain types of evidence may be relevant to several elements. For example, evidence relevant to evaluating social distinction for the purpose of deciding whether a particular social group exists is often also relevant to whether the past or feared harm is “on account of” the applicant’s membership (or imputed membership) in the particular social group. The same evidence might also be relevant to the government’s willingness or ability to protect an applicant from a non-government persecutor. Social attitudes often may affect both an individual persecutor’s motivations and government policies and practice. While there are often facts that are relevant to more than one aspect of the analysis, those facts must be analyzed separately, using the appropriate standard, for each element.

Officers should be alert that under the standards clarified in *Matter of A-B-*, few gang-based or domestic-violence claims involving particular social groups defined by the members’ vulnerability to harm may merit a grant of asylum or refugee status—or pass the “significant possibility” test in credible-fear screenings, INA § 235(b)(1)(B)(v) or the “reasonable possibility” test in reasonable fear screenings—because an applicant must prove, or establish a significant possibility that, his or her government is unable or unwilling to protect him or her. The mere fact that perfect policing does not exist in the applicant’s home country, that the country in question has an extremely high crime rate, or that certain populations are more likely to be targeted by private criminals, does not itself establish the home government is “unable or unwilling” to curb the persecution. Again, the home government must either condone the behavior or demonstrate a complete helplessness to protect victims of such alleged persecution.

VII. Contact

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Office of Chief Counsel.

VIII. Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law, or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Noferi, Mark (EOIR)

From: (b) (6)
Sent: Thursday, July 12, 2018 7:56 AM
To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] ICE FILING FORM OPPOSITION TO ALL MOTIONS TO TERMINATE UNDER PEREIRA

(b) (6)

----- Forwarded message -----

From: Dan Kowalski <dkowalski@david-ware.com>
Date: Wed, Jul 11, 2018 at 5:27 PM
Subject: [immprof] ICE FILING FORM OPPOSITION TO ALL MOTIONS TO TERMINATE UNDER PEREIRA
To: IMMPROF (UCLA) (immprof@lists.ucla.edu) <immprof@lists.ucla.edu>

[NJ DHS Pereira Response](#)

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Noferi, Mark (EOIR)

From:

(b) (6)

Sent:

Thursday, July 12, 2018 5:03 PM

To:

Noferi, Mark (EOIR)

Subject:

NY CLE application

http://ww2.nycourts.gov/sites/default/files/document/files/2018-03/application_indivatty.pdf

Noferi, Mark (EOIR)

From:

(b) (6)

Sent:

Wednesday, July 25, 2018 8:17 AM

To:

Noferi, Mark (EOIR)

Subject:

Article

<https://www-law360-com.cdn.ampproject.org/c/s/www.law360.com/amp/articles/1065415>

Noferi, Mark (EOIR)

From: (b) (6)
Sent: Saturday, July 28, 2018 1:50 PM
To: Noferi, Mark (EOIR)
Subject: DC coffee map

<https://perkeddc.net/perked-dc-coffee-map/>

(b) (6)

Noferi, Mark (EOIR)

From:

(b) (6)

Sent:

Wednesday, August 8, 2018 11:55 PM

To:

Noferi, Mark (EOIR)

Subject:

APA lawsuit

<https://www.forbes.com/sites/stuartanderson/2018/08/08/lawsuit-filed-to-protect-foreign-students-from-ice-and-uscis/>

Noferi, Mark (EOIR)

From: (b) (6)
Sent: Thursday, August 9, 2018 3:23 PM
To: Noferi, Mark (EOIR)
Subject: Appeals

https://www.washingtonpost.com/local/immigration/judge-halts-mother-daughter-deportation-threatens-to-hold-sessions-in-contempt/2018/08/09/a23a0580-9bd6-11e8-8d5e-c6c594024954_story.html?utm_term=.5aec495d82de

(b) (6)

Noferi, Mark (EOIR)

From: (b) (6)
Sent: Monday, August 13, 2018 12:26 PM
To: Noferi, Mark (EOIR)
Subject: Metro disruptions

https://www.washingtonpost.com/news/powerpost/wp/2018/08/13/help-commuting-employees-cope-with-metrorail-disruption-federal-agencies-told/?utm_term=.1cdc5be45e4a

(b) (6)

Noferi, Mark (EOIR)

From: (b) (6)
Sent: Friday, August 17, 2018 2:10 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: EOIR Entry-Level Positions Through AG Honors Program - Deadline Labor Day

----- Forwarded message -----

From: (b) (6)
Date: Friday, August 17, 2018
Subject: EOIR Entry-Level Positions Through AG Honors Program - Deadline Labor Day
To: "immprof@lists.ucla.edu" <immprof@lists.ucla.edu>

All,

Hope you are well. Please consider forwarding the below information to your recent law student graduates interested in immigration law, and encouraging them to apply for the Executive Office for Immigration Review, which as you know operates the nation's immigration courts. Applicants can check "EOIR OGC" if interested in EOIR's General Counsel, "OCIJ" if interested in clerking for a local immigration court, and "BIA" if interested in working for the Board of Immigration Appeals.

Note: Eligibility is limited to graduating law students and recent law school graduates who entered judicial clerkships, graduate law programs, or qualifying legal fellowships within 9 months of law school graduation and who meet additional **eligibility requirements**.

E.g. students that have been clerking directly after law school are still eligible to apply.

The deadline is the Tuesday after Labor Day.

See links below for more info:

<https://www.justice.gov/legal-careers/entry-level-attorneys>

<https://www.justice.gov/legal-careers/honors-program-participating-components#eoir>

<https://www.justice.gov/eoir/office-of-the-general-counsel>

Best,

Mark

(b) (6)

(b) (6)

Noferi, Mark (EOIR)

From: (b) (6)
Sent: Tuesday, August 21, 2018 10:37 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] FOIA Results: Immigration Judges' Conference Materials for 2018

(b) (6)

----- Forwarded message -----

From: Dan Kowalski <dkowalski@david-ware.com>
Date: Tue, Aug 21, 2018 at 10:23 PM
Subject: [immprof] FOIA Results: Immigration Judges' Conference Materials for 2018
To: Immprof (immprof@lists.ucla.edu) <immprof@lists.ucla.edu>

From: <https://www.hoppocklawfirm.com/matthewhoppock/>

<https://www.hoppocklawfirm.com/foia-results-immigration-judges-conference-materials-for-2018/>

"Every summer the Immigration Judges from around the country meet in suburban Washington D.C. for a training session. The training materials are interesting, because they help us understand the IJs' thinking on specific issues. The 2018 conference was held at the Sheraton in Tysons Corner, VA. Jeff Sessions gave a speech at this conference which, for many observing, raised serious questions about his lack of willingness to allow IJs to make independent judgments. He also talked about his decision in *Matter of A-B-* which he published later that day.

After the conference in 2018 I requested the training materials, handouts, slides, program, and schedule. This is what I received in response:

Program Schedule

Cancellation of Removal:

Summary of IJ Procedures for Adjudicating Non LPR Cancellation

Claims to U.S. Citizenship:

Slides – Resolving Claims to United States Citizenship Recent Updates and Adjudication Challenges

Evidentiary Challenges in Immigration Court:

Immigration Law – Evidentiary Challenges for Appellate Adjudication in the Digital Age 2018

Slides – Evidentiary Challenges – Admissibility, Weight, Reliability, and Impeachment

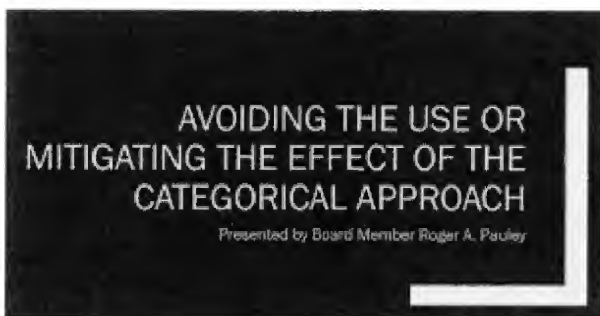
Evidentiary Issues – Assessing Evidentiary Weight – Circuit Court Case Law Summaries

Evidentiary Issues – Reliability of Government Documents – Circuit Court Case Law Summaries

Developments in Criminal Immigration and Bond Law:

Slides – Developments in Criminal Immigration and Bond Law

This presentation is really striking, because Board Member Roger Pauley appears to be instructing the IJs not to apply the “categorical approach” when it doesn’t lead to a “sensible result.” The “categorical approach” is mandatory, and the Supreme Court has repeatedly had to reverse the BIA and instruct them to properly apply it. So, it’s definitely disheartening to see this is the instruction the IJs received at their conference this summer on how to apply the categorical approach:



Advanced Adjudication Issues in Asylum Law:

Slides – Advanced Adjudication Issues in Asylum Law An Examination of the One-Year Bar

Advanced Criminal Immigration Issues:

The Evolving Interpretation of the Categorical Approaches – ILA Jan 2017

If you look at the schedule, you'll see there are a number of sessions for which we did not receive any materials. I'm not sure what that means. It's possible there were no prepared remarks, no slides, no handouts, and no materials for the presentation. I think it's more likely that there are additional materials that haven't been produced, so we'll be following up with EOIR to see if we can get the rest."

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Noferi, Mark (EOIR)

From: (b) (6)
Sent: Wednesday, August 29, 2018 12:12 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] United States v. Virgen-Ponce (Pereira)
Attachments: United States v. Virgen-Ponce_ 2018 U.S. Dist. LEXIS 12.pdf

----- Forwarded message -----

From: Dan Kowalski <dkowalski@david-ware.com>
Date: Tue, Aug 28, 2018 at 10:41 PM
Subject: [immprof] United States v. Virgen-Ponce (Pereira)
To: Immprof (immprof@lists.ucla.edu) <immprof@lists.ucla.edu>, ICLINIC@LIST.MSU.EDU <ICLINIC@list.msu.edu>

Daniel M. Kowalski

Editor-in-Chief

Bender's Immigration Bulletin (LexisNexis)

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(b) (6)

United States v. Virgen-Ponce

United States District Court for the Eastern District of Washington

July 26, 2018, Decided; July 26, 2018, Filed

No. 2:18-CR-0092-WFN-1

Reporter

2018 U.S. Dist. LEXIS 125687 *

UNITED STATES OF AMERICA, Plaintiff, -vs- JORGE VIRGEN-PONCE, Defendant.

Counsel: [*1] For Jorge Francisco Virgen-Ponce, also known as Jorge Virgen-Ponce, Defendant: William Miles Pope, LEAD ATTORNEY, Federal Defenders - SPO, Eastern Washington, Spokane, WA. For USA, Plaintiff: Matthew F Duggan, LEAD ATTORNEY, U S Attorney's Office - SPO, Spokane, WA.

Judges: WM. FREMMING NIELSEN, SENIOR UNITED STATES DISTRICT JUDGE.

Opinion by: WM. FREMMING NIELSEN

Opinion

ORDER DISMISSING INDICTMENT

UNITED STATES MARSHAL ACTION REQUIRED

A pretrial conference and motion hearing was held July 24, 2018. The Defendant, who is in custody, was present and represented by Miles Pope and assisted by Court-appointed interpreter Bea Rump; Assistant United States Attorney Matthew Duggan represented the Government.

The Court addressed Defendant's Motion to Dismiss. ECF No. 27. The Defendant challenges the validity of the prior deportation because the notice to appear failed to include the time and date of the hearing as required by 8 U.S.C. § 1229(a):

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following: [*2]

- (A) The nature of the proceedings against the alien.
- (B) The legal authority under which the proceedings are conducted.
- (C) The acts or conduct alleged to be in violation of law.
- (D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title. (ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number. (iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)(i) The time and place at which the proceedings will be held. (ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

8 U.S.C. § 1229 (West). The Supreme Court recently [*3] examined this statute in the context of an immigration mechanism known as the "stop time rule." The Supreme Court concluded that, "A notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a).'" *Pereira v. Sessions*, 138 S. Ct. 2105, 2113-14, 201 L. Ed. 2d 433 (2018). "If the three words 'notice to appear' mean anything in this context, they must mean that, at a minimum, the Government has to provide noncitizens 'notice' of the information, i.e., the 'time' and 'place,' that would enable them 'to appear' at the removal hearing in the first place. Conveying such time-and-place information to a noncitizen is an essential function of a notice to appear, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceedings." *Id.* at 2115. In support of this plain reading of the statute, the Supreme Court notes that the same section addresses an alien's right to an attorney. If the alien does not know the date and time of the hearing they are effectively denied their right to counsel for the hearing.

The Government argues that because the context for the plaintiff in the *Pereira* case differs from the Defendant's, that the Court need not apply the clear language [*4] of the statute and the Supreme Court's interpretation thereof. Further, the Government argues that despite the lack of compliance with the statute as a Notice to Appear, the document served upon the Defendant still met the 8 C.F.R. § 1003.14 definition of a charging document sufficient to confer jurisdiction on the immigration court.

The Court concurs from a practical standpoint Defendant clearly became aware of the time and date set for the immigration hearing because he was in custody at the time and was transported to the hearing. However, the Court must rely upon the plain language of the statute as well as the precedent set by the Supreme Court. The statute plainly states that the Notice of Hearing must contain the date and time of the hearing. Lack of such information deprives the alien of proper notice as required by § 1229(a). Since the Notice of Appearance in this case omits information required by the statute, the Notice is deficient.

The immigration judge lacked jurisdiction over Defendant's case because of the deficient Notice. "Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service." 8 C.F.R. § 1003.14.

Charging document means [*5] the written instrument which initiates a proceeding before an Immigration Judge. . . For proceedings initiated after April 1, 1997, these documents include a Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien.

8 C.F.R. § 1003.13. Contrary to the Government's position, the charging document required to vest jurisdiction must include a Notice to Appear. Immigration judges examining this issue have reached the same conclusion as this Court that lack of a valid charging document as required by § 1229(a) means that the IJ lacks jurisdiction. See ECF No. 27, Exhibit 3. Lack of a statutorily compliant Notice to Appear in Defendant's case means that the immigration court did not have jurisdiction.

The Defendant need not show that he exhausted administrative remedies because the immigration court proceedings were void. The Government recognizes that exceptions to exhaustion exist. "Exhaustion of administrative remedies is not required where the remedies are inadequate, inefficacious, or futile, . . . or where the administrative proceedings themselves are void." *United Farm Workers of Am., AFL-CIO v. Arizona Agr. Employment Relations Bd.*, 669 F.2d 1249, 1253 (9th Cir. 1982). Administrative proceeding held where the immigration court lacked jurisdiction [*6] are void. See *Wilson v. Carr*, 41 F.2d 704, 706 (9th Cir. 1930) ([I]f the order is void on its face for want of jurisdiction, it is the duty of this and every other court to disregard it.") Consequently, Defendant's case rests on an invalid deportation and must be dismissed. The Court has reviewed the file and Motions and is fully informed. This Order is entered to memorialize and supplement the oral rulings of the Court. Accordingly,

IT IS ORDERED that:

1. Defendant's Motion to Dismiss, filed July 13, 2018, **ECF No. 27**, is **GRANTED**.
2. The Indictment is **DISMISSED without prejudice**.

The District Court Executive is directed to file this Order and provide copies to counsel **AND TO** United States Marshals Service--**action required**.

DATED this 26th day of July, 2018.

/s/ Wm. Fremming Nielsen

WM. FREMMING NIELSEN

SENIOR UNITED STATES DISTRICT JUDGE

Noferi, Mark (EOIR)

From: (b) (6)
Sent: Friday, August 31, 2018 8:38 AM
To: Noferi, Mark (EOIR)
Subject: Trump seeks to freeze pay in 2019 for federal workers

Trump seeks to freeze pay in 2019 for federal workers

https://www.washingtonpost.com/politics/trump-seeks-to-freeze-pay-in-2019-for-federal-workers/2018/08/30/b00be5cc-ac78-11e8-a8d7-0f63ab8b1370_story.html

Noferi, Mark (EOIR)

From: (b) (6)
Sent: Monday, September 3, 2018 10:43 PM
To: Noferi, Mark (EOIR)
Subject: Fwd: [immprof] The BIA vs. the Supreme Court? — Jeffrey S. Chase

----- Forwarded message -----

From: Dan Kowalski <dkowalski@david-ware.com>
Date: Sat, Sep 1, 2018 at 7:49 PM
Subject: [immprof] The BIA vs. the Supreme Court? — Jeffrey S. Chase
To: immprof@lists.ucla.edu <immprof@lists.ucla.edu>

<https://www.jeffreyschase.com/blog/2018/9/1/the-bia-vs-the-supreme-court>

The BIA vs. the Supreme Court?

Although it hasn't caught the attention of the public or the media, the Supreme Court's June 21 decision in *Pereira v. Sessions* has inspired immigration lawyers this summer, giving reason to hope and dream. Unfortunately, the case's importance gets lost in the details to those not proficient in the field of immigration law. The issue that the Supreme Court agreed to decide was a narrow one: whether a Notice to Appear (i.e. the document that must be served by DHS on the Immigration Court in order to commence removal proceedings) that lacks a time and a date of the initial hearing is sufficient to invoke the "stop-time rule" that would prevent a noncitizen from accruing the 10 years of continuous presence in the U.S. needed to apply for a relief from deportation called cancellation of removal. If you are a layperson, I'm sure I've already lost you. But read on, as what preceded doesn't really matter for purposes of our discussion; the important part is yet to come.

BIA precedent decisions that are subpar in their rationale are often upheld by circuit courts because of something called *Chevron* deference. *Chevron* refers to a 1984 Supreme Court case requiring courts to defer to the interpretation of statutes by federal agencies that are specifically charged with administering the statute in question. The Board of Immigration Appeals is a part of one of the agencies (EOIR) charged with administering immigration laws; therefore, under *Chevron*, its decisions are owed deference by the circuit courts, even if those courts disagree with the BIA's decision or would have reached a different outcome themselves. But before such deference is owed, the decision must pass a two-step test. First, the reviewing court must find that the statute the BIA is interpreting is

ambiguous. This is important, because if the statute is clear on its face, there is no basis for the agency to have to interpret that which needs no interpretation. Only if the court determines that the statute is in fact ambiguous does it apply the second step of the test, which is whether the agency's interpretation is reasonable.

I'm pretty certain that I've lost even more readers in the preceding paragraph. I thank those of you who are still with me for your patience. In *Pereira*, the statute involved is section 239(a) of the Immigration and Nationality Act, which states what information the Notice to Appear (i.e. the document needed to commence removal proceedings) must contain. In a 2011 precedent decision, the BIA had interpreted that statute to mean that the time and date of the initial hearing were not critical elements, and that their inclusion was not required to trigger the stop-time rule. Six federal circuits accorded *Chevron* deference to the BIA's interpretation. The lone exception was the Third Circuit. The Supreme Court agreed to hear the case to resolve this split. In an 8-1 decision (in which even Justice Gorsuch, Trump's appointee, joined the majority), the Court sided with the Third Circuit. The Court explained that no *Chevron* deference was due because the statute was crystal clear, as it said in no uncertain terms that a time and a date are among the information a Notice to Appear must contain.

Finally, here is the really important part. In its decision, the Supreme Court stated that a notice that does not contain a time and date of hearing "is not a notice to appear" under section 239(a). The highest court in the land did not say that it is not a notice to appear only for some narrow purpose; it bears repeating that it said without such information, the document is not a Notice to Appear.

Those of you who are still reading might feel let down about now. You're saying "That's it? Where is the big payoff I was promised? I'll never get those three minutes of my life back that I just wasted reading jibberish about some kind of stopping rule that I still don't understand." So here is where I hope I make it worthwhile. All of us immigration lawyers read the above sentence and instantly thought the same thing: if the Supreme Court just said that a notice without a time and date is not a Notice to Appear, than almost every one of our collective clients were never properly put into removal proceedings. The Supreme Court decision mentioned that when asked what percentage of NTAs issued in the past three years lacked a time and a date, the government responded "almost 100 percent." There are presently close to 750,000 cases pending before immigration courts, and there were hundreds of thousands of cases already decided by those courts over the past 15 or 20 years that also involved NTAs missing the time and date. And the courts are now going to have to find that nearly all of those proceedings were invalid. Old removal orders will have to be reopened and terminated. Almost all pending cases will have to be terminated. Although DHS will at least intend to restart all of those hearings over by now serving each individual

with an NTA that does contain a time and date, how long might that take to accomplish? And even if they are placed into proceedings again, those who were previously denied relief get a second chance. Perhaps this time with a different judge, a better lawyer, and more equities in their favor?

So in a year in which the Attorney General has tried to remake immigration laws to his own liking, and continues to assault the independence of the only judges he directly controls; in which children have been unapologetically separated from their parents at the border, in which victims of domestic violence have been told the rapes and violent abuses they have suffered are will get them no protection in the U.S.A., *Pereira* allowed us to dream of pushing a “restart” button, a “do-over.” Attorneys began filing motions to terminate. The response of immigration judges was mixed, with some agreeing with the argument and terminating proceedings; while others said no, *Pereira* was only meant to apply to the narrow technical issue of the “stop-time” rule, and not to the broader issue of jurisdiction.

Of course, the BIA needed to weigh in on this issue. I had no doubt that the Board would rule with the latter group and find that proceedings need not be terminated. And of course, on Friday, that’s just what they did. The response from the legal community has been one of outrage. First of all, it normally takes 18 months or longer for the BIA to issue a precedent decision; it can sometimes take them many years. Here, the Board issued its decision in two months. As one commenter pointed out, it reads like a college freshman paper written at midnight. Considering the importance of the issue, the Board truly abandoned its legal responsibility by cranking out such a poorly written decision that fails to address (much less adequately analyze) most of the major issues raised by *Pereira*.

While I could go on and on with what is wrong with the BIA decision (issued on a Friday afternoon before the Labor Day weekend, the better to sneak under the radar), I’ll just focus here on one point. The decision (written by Board Member Molly Kendall Clark), cites the applicable regulation (8 C.F.R. section 1003.14(a)), which states that “Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service.” As background, another section of the regulations defines “charging document” to include a “Notice to Appear.” The documents in question here all purport to be Notices to Appear, and do not meet the definition of any other charging document described in the regulation. Kendall Clark writes that the regulation does not specify what information must be contained in the charging document at the time it is filed with the Immigration Court, “nor does it mandate that the document specify the time and date of the initial hearing before jurisdiction will vest.”

Really? Because the U.S. Supreme Court just said, very clearly, that a notice lacking a time and date of hearing is not a Notice to Appear. How is it OK for the BIA to just ignore a crystal clear holding of the Supreme Court?

The answer is that in the mind of the BIA's judges, the Supreme Court doesn't have the ability to fire them, while the Attorney General does. The other truth is that while BIA judges have been removed under Republican administrations for being too liberal, none has ever suffered any consequences under Democratic administrations for being too conservative. Although I'm in the liberal camp, I'm not saying that the BIA is not entitled to reach a conservative conclusion. But it can't so blatantly disregard the law (in particular, a decision of the Supreme Court) out of self-preservation or political expediency.

The next step will be appeal of the issue to the various circuits. In light of *Pereira*, there should be no *Chevron* deference accorded to the Board's latest decision. However, should another circuit split result, this issue may end up before the Supreme Court again.

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Sent from a small machine. Apologies for brevity, typos.

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(b) (6)

Noferi, Mark (EOIR)

From:

(b) (6)

Sent:

Wednesday, September 12, 2018 3:36 PM

To:

Noferi, Mark (EOIR)

Subject:

NSD GC

<https://www.justice.gov/legal-careers/job/supervisory-attorney-advisor-general-counsel-gs-0905-15>

Noferi, Mark (EOIR)

From:

(b) (6)

Sent:

Monday, September 11, 2017 1:13 PM

To:

Noferi, Mark (EOIR)

Subject:

Buses to Skyline

Buses To Skyline

morning:

7 28F Pentagon

7:20 28F Pentagon

7:40 28F Pentagon

8:00 28F Pentagon

8:05 Chariots P City

8:30 28F Pentagon

9:10 Chariots P City

10 am Chariots P City

Afternoon:

28F to Pentagon - Every 20 min from 4:15 to 6:35 (last one) downstairs by Bldg 6

Chariots to P City - 5:20 by Panera and 5:25 downstairs by Bldg 6

Sent from my iPhone

Noferi, Mark (EOIR)

From: (b) (6)
Sent: Friday, October 6, 2017 6:44 AM
To: Noferi, Mark (EOIR)
Subject: The Washington Post: What to expect at the Wharf, D.C.'s newest dining and entertainment hub

I thought you might like this story from The Washington Post.

What to expect at the Wharf, D.C.'s newest dining and entertainment hub The project on the Southwest waterfront, debuting Oct. 12, has the potential to be unlike any other place in the District — a robust waterfront dining and entertainment scene with three music venues and about 20 restaurants and bars.

<https://www.washingtonpost.com/news/going-out-guide/wp/2017/10/05/what-to-expect-at-the-wharf-washingtons-newest-dining-and-entertainment-destination/>

Sent from my iPad

Noferi, Mark (EOIR)

From: (b) (6)
Sent: Friday, March 30, 2018 8:40 AM
To: Noferi, Mark (EOIR)
Subject: Fwd: Nationwide Victory for Asylum Applicants

----- Forwarded message -----

From: (b) (6)
Date: Fri, Mar 30, 2018 at 8:04 AM
Subject: Nationwide Victory for Asylum Applicants
To: (b) (6)



Dear Mark,

We believe that our doors must be open to those seeking protection—and that means ensuring a fair process for those seeking asylum in the United States. Today, we achieved a major court victory that will help ensure asylum seekers have a fair and meaningful opportunity to have their claims heard.

A federal court in Seattle issued a favorable and far-reaching decision in our class action lawsuit, [*Mendez Rojas v. Johnson*](#). The court's ruling orders the government to remove significant impediments to filing asylum applications within one year of arriving in the United States, as required by law.

Specifically, [under the court's ruling](#), the Department of Homeland Security must provide all class members—defined as individuals who enter the United States, express a fear of return to their home countries, and then are released from immigration custody—with written notice of the one-year deadline, and the government must accept as timely filed any asylum application from a class member that is filed within one-year of adoption of the notice. The court also ordered the

government to adopt, publicize, and implement uniform procedural mechanisms that will ensure class members are able to file their asylum applications.

The Council and our partners, the Northwest Immigrant Rights Project and the law firm of Dobrin & Han, PC, are pleased with the results today and look forward to the government's compliance with the court order. We will post updated implementation information on our website as it becomes available.

Sincerely,

(b) (6)

Make a Contribution



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[1331 G St. NW Suite 200. Washington, D.C., 20005](#)

(b) (6)